INTERSTATE COMMERCE COMMISSION REPORTS

VOLUME 354

DECISIONS OF THE
INTERSTATE COMMERCE COMMISSION
OF THE UNITED STATES

(Finance Reports)

May 1977—January 1979

REPORTED BY THE COMMISSION

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[6] H. G. Homme, Jr. was appointed Acting Secretary on June 8, 1977 and appointed Secretary on November 6, 1978.

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INTERSTATE COMMERCE COMMISSION REPORTS

AB-1 (SUB-NO. 48)

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—ABANDONMENT BETWEEN SANBORN AND WANDA IN REDWOOD COUNTY, MINNESOTA

Decided May 23, 1977

On appeal, present and future public convenience and necessity found to permit abandonment by Chicago and North Western Transportation Company of the line of railroad between Sanborn and Wanda in Redwood County, Minn.

Louis T. Buerinck, Stuart F. Gassner, and *Christopher A. Mills* for applicant.

REPORT OF THE COMMISSION

DIVISION 3, ACTING AS AN APPELLATE DIVISION, COMMISSIONERS BROWN, MACFARLAND, AND CHRISTIAN

BY DIVISION 3:

By report and order served December 29, 1976, Review Board No. 5, Member Taylor dissenting, denied the application of Chicago and North Western Transportation Company (C&NW) for a certificate of public convenience and necessity permitting abandonment of its line of railroad between Sanborn and Wanda, a distance of 8.2 miles, in Redwood County, Minn. Applicant filed an appeal to the review board's decision on January 13, 1977, and no protestant has filed a response thereto. Our conclusions differ from those of the review board.

Except as noted, we adopt the facts as set forth in the review board's report and order and only repeat such facts as are necessary for purposes of clarity.

This is not the first time C&NW has tried to abandon its line of railroad between Sanborn and Wanda. Prior to the denial by Review Board Number 5, C&NW filed an application to abandon this same line on October 12, 1971 (Finance Docket No. 26847, not printed). That application was subsequently denied by decision of an Administrative Law Judge in a report and order served May 11,

1973. C&NW then filed a petition to reopen that proceeding which was denied by order of the Commission, dated March 21, 1975, because "the existing record was old and the viability of the line could best be judged through examination of a new record."

C&NW filed its short form application in the instant proceeding on June 16, 1975, pursuant to the Commission's "Special Rules for Railroads Proposing Abandonments Where the Requirements of Public Convenience and Necessity are Minimal or Nonexistent," subpart B of 49 CFR 1121, which were then in effect. The application was governed by section 1(18) of the Interstate Commerce Act (act) rather then new section 1a since it was filed prior to the enactment of Public Law 94-210, the Railroad Revitalization and Regulatory Reform Act (4RA). Protests to the proposed abandonment were filed by the Minnesota Public Service Commission (Minnesota PSC), the Farmers Co-op Elevator of Wanda, Minnesota (Wanda), the city of Redwood Falls (Redwood), and the Railway Labor Executives Association (RLEA), and the proceeding was set for consideration under modified procedure by order served April 7, 1976.

In support of its application, C&NW relied on evidence submitted by the verified statements of M. S. Reid, Assistant Chief Engineer—Administration of C&NW, D. B. Carlisle, Division Manager of C&NW's Central Division, George W. Carroll, Director of Special Studies for C&NW, H. J. Brugenhemke, Market Manager—Grain, and J. H. Bonawitz, District Sales Representative, all contained in C&NW opening statement filed May 17, 1976. Summarized, the evidence showed that the Sanborn-Wanda line was in poor condition, requiring an expenditure of $214,515 for rehabilitation to bring it into compliance with the Federal Railroad Administration's (FRA) minimum class I track safety standards, with $24,425 required annually for maintenance thereafter; that the line cannot handle jumbo covered hoppers because of a 220,000 pound limitation; that 81.5 percent of cars ordered in 1974 and 100 percent of total cars ordered in 1974 and 1975 were furnished; that this total number of cars was a substantially higher percentage of cars furnished than for the Central Division as a whole during the same period; that carload traffic on the line declined from 102 carloads in 1972 to 95 in 1973, 123 in 1974 and 80 in 1975; that C&NW in 1975 had a working capital deficit of $19,365,000 and a net railway operating deficit of $4,506,000; that the line handled less than 1.1 percent of the grain produced in the involved area; that the only shipper on the line, Wanda Elevator, recently joined the

Southern Seven Cooperative located 21.5 miles from Wanda and has reduced rates available on 50-hopper car shipments; that the 50-car grain rate from Springfield to the Gulf export market is 42 cents per hundredweight lower than the single-car rate from Wanda; that the cost of trucking grain from Wanda to Springfield is 7 cents per hundredweight; that truck service is available; that the line will operate at a deficit of from $5,000 to $13,000 annually on the basis of 1972-1975 revenue levels, not including the present cost of rehabilitation; and that the line's net salvage value is $118,192.

Although there were several protests to the application, only Robert Graff, a member of the board of directors of Wanda Elevator, and Frederick N. Bless, manager of Wanda Elevator, filed verified statements in support thereof. These statements were attached to the protest by Wanda Elevator to the application and were filed July 28, 1975, prior to the May 17, 1976, filing by C&NW of its opening statements on modified procedure. By his statement, Robert Graff indicates that Wanda Elevator is a separate entity though affiliated with the Southern Seven Co-op and does not contemplate Wanda serving as a storage and feeder facility; that Wanda has the option of loading cars at Wanda and billing them through Southern Seven, thus avoiding unnecessary handling of grain; and that the need for grain storage railroad cars at Wanda has not decreased since 1972 but has in fact increased.

Frederick Bless states that he ordered 448 cars but only received 67 in 1973; that, to the best of his recollection, he requested 500 cars in 1974 and the same number in 1975; that, except for 100,000 bushels per year, all grain shipped from Wanda could be shipped by rail; that because of the failure to deliver cars requested in 1973, Wanda had to ship grain by truck at an additional cost of $13,000; that from July 1, 1972, to June 30, 1973, Wanda shipped 613,000 bushels of grain; that from July 1, 1973, to June 30, 1974, a total of 1,270,000 bushels were shipped; from July 1, 1974, to June 30, 1975, a total of 1,100,000 bushels were shipped; and that, from July 10, 1974, to October 1, 1974, the line was out of service.

Protests by the Minnesota Public Service Commission and the city of Redwood Falls reiterate the statements submitted by Wanda Elevator, alleging that a loss of rail service to Wanda would put the elevator at a competitive disadvantage resulting in irreparable loss to the farms and businesses of this area and that transportation by truck is disadvantageous since transport would have to be over County Road No. 4 which is a restricted eight-ton road in the springtime.

In its report and order, Review Board No. 5 found that C&NW had not borne its burden of proof "in rebutting prior findings in Finance Docket No. 26847, of need for rail service;" that the Commission has found in the past that grain elevators cannot operate successfully without rail service; that C&NW cannot rely on even greater rehabilitation cost and annual maintenance than that determined in the prior proceeding; that the need for rail service has not changed from that which was previously found in the prior proceeding; and that the decrease in traffic has been caused by C&NW's inability to furnish cars when necessary.

On appeal, C&NW argues that the report and order of Review Board No. 5 ignores the fact that none of the protestants submitted any evidence whatsoever in response to the Commission's modified procedure order but relied unduly upon nonevidentiary statements contained in the protests themselves. It also argues that the review board gave undue weight to the prior decision of the Administrative Law Judge denying a prior application to abandon the same line on the basis of an entirely different record. C&NW further questions the review board's reliance upon *Missouri Pac. R. Co. Abandonment, Crete Branch,* 307 I.C.C. 189 at 206 (1959) for the proposition that grain elevators cannot operate successfully without rail service.

As we indicated above, no response to C&NW's appeal has been filed.

Discussion and Conclusions

C&NW filed its application pursuant to 49 CFR 1121.23, the so-called 34-carload rule. Under the rebuttable presumption that arises by operation of that procedural rule, the Commission may grant the application without further proceedings if no party opposing the abandonment indicates by a proffer of substantial evidence that it would be able to rebut the presumption. Although the review board does not discuss this point, we may assume that based upon the protests submitted, the proceeding was designated for modified procedure after a determination that, given the opportunity for further formal proceedings, the presumption could be rebutted.

As applicant has pointed out, no protestant submitted verified statements in response to C&NW's detailed verified evidence contained in its Opening Statement of Facts and Argument. The only verified statements of protestants were those of Wanda Elevator filed with its protest to the application and submitted prior to the submission of applicant's verified statement. Although these statements were not filed in response to C&NW statement pursuant to the Commission's modified procedure order, we cannot agree with applicant's assertion that protestants should have been found in default and their statements rejected as nonevidentiary submissions. Applicants had adequate opportunity to address the statements of protestant, and in the absence of a showing that an interested party was misled, courts have been reluctant to find any due process violation. *Cella* v. *United States*, 208 F. 2d 783 (7th Cir. 1953). In addition, rule 46(b) (49 CFR 1100.46), to which applicant refers, is permissive in that it relates to proceedings under modified procedure, which *may* be disposed of without further notice to the defaulting party. Moreover, 49 CFR 1100.2 states that the rules in that part are to be liberally construed to secure just, speedy, and inexpensive detrimentation of the issues presented. Under the circumstances of this proceeding, strict adherence to rule 46(b) would create an inequity rather than promote justice. This result would be inconsistent with the statutory obligation placed upon the Commission to balance the issue of public convenience and necessity and the burden on interstate commerce, *Colorado* v. *United States*, 271 U.S. 153 (1926).

Grounding its decision on the prior proceeding, the review board found that "C&NW had not borne its burden of proof in rebutting prior findings of need * * *." As we indicated above, the instant application was the basis for the development of an entirely different record than that which was previously considered. The prior findings of public need for rail service should not have been determinative in the instant case. This is especially true in light of the Commission's conclusions that the prior record was too old for reexamination of the viability of the line. In addition, the prior decision intimated only that operations on the line and maintenance could continue for at least another year. The implication, of course, is that reexamination might be necessary in the near future. The review board's reliance on the findings of need made prior to this new proceeding was error and prejudicial to applicant's case.

The central issue now, as it should have been then, is whether the applicant may justly be required to continue to bear the loss necessarily entailed by operation of the line based upon the *present* record.

An important point not considered by the review board in relying heavily upon the prior findings is the changed financial condition of C&NW. The applicant's marginal financial condition has been recognized recently by the Commission in *Chicago and North Western Transp. Co.—Abandonment,* 348 I.C.C. 635, 639-640 (1976) and *Chicago and North Western Transp. Co.—Abandonment,* 348 I.C.C. 708, 712-713 (1976). Moreover, C&NW submitted evidence showing excesses of current liabilities over current assets of more than $19 million as of December 31, 1975. C&NW's net railway operating income in 1975 was a deficit of $4,500,000.

In the earlier decision, it was found that the C&NW system could absorb the $100,000 rehabilitation expenditure required for continued operation of the line. By evidence submitted, applicant shows that the rehabilitation expenditures required have inflated to $215,000 in order to bring the line into compliance with FRA class I safety standards. The review board discounted the escalation in rehabilitation cost because of C&NW's failure to expend $100,000 to upgrade the line following the previous denial of the application.

Expenditures required for rehabilitation of the line must be taken into account in determining whether continued operation thereof would impose an undue burden on interstate commerce. See, *Purcell* v. *United States,* 315 U.S. 381 (1942). The fact that the initial $100,000 was not expended by the applicant to rehabilitate the line in no way changes the real cost of rehabilitation today or reduces the present burden on interstate commerce. Even discounting for inflation, the initial $100,000 required in 1973 to rehabilitate the line would be a burden on the applicant and interstate commerce today when the financial position of C&NW is considered and compared to its position in 1973.

We note that no protestant denied that the line was in need of extensive repair. It was also the apparent consensus that, at the present level of traffic moving over the line, annual maintenance costs exceed revenues generated on the line. If there is not some prospect of recouping the rehabilitation expenditure, such expenditure should not be made. See, *e.g., Missouri-Kansas-Texas R. Co. Abandonment, Okla.,* 338 I.C.C. 728 (1971).

The review board gave credence to the verified statement of Wanda's manager that "to the best of his recollection" he ordered 440 to 500 cars in 1973, 1974, and 1975. This testimony is, however, rebutted by the applicant's records submitted in its opening statements. That evidence indicates 100 percent of the total number of cars ordered in 1974 and 1975 were furnished. We are cognizant of the fact that the total number of cars requested were not furnished during the month ordered. Although this evidence may also illustrate that the applicant did not provide complete service when it was desired, it, more importantly, indicates that the actual number of cars ordered would not have produced a profit on the line and that instead of increasing, the actual number of requested cars has decreased since 1972. In terms of carloads per mile, the line carried 19.8 carloads per mile in 1972, 11.6 in 1973, 15.0 in 1974, and 9.8 in 1975. This evidence was compiled from waybill and freight bills of C&NW and remained unrebutted by protestants.

Protestants do not allege these computations of carload movements are in error but contend that had all grain moved by rail the line would have been profitable. Although this allegation may be valid, the records submitted by C&NW show that less than 150 cars were requested during any single year. The record also illustrates that it took 192 carloads to produce a small profit on the line in years past.

In order to determine whether the public convenience and necessity would permit the proposed abandonment, it is necessary that the losses from operations combined with the burdens of rehabilitation be weighed against the needs of the public for the continued operation of the line, now and in the future, based upon the present record. The necessity for careful weighing of the factors is particularly obvious in the instant case, for, once rehabilitation is commenced, expenditures could not thereafter be recouped by C&NW in light of the declining traffic on the line.

In numerous proceedings, the Commission has found that shippers are likely to incur inconvenience and increased transportation costs as a result of proposed abandonment, but these are not sufficient to outweigh the detriment to the public interest of continued operations of uneconomic and excess facilities. *Fort Dodge, Des Moines & Southern Ry. Co. Abandonment*, 312 I.C.C. 708 (1961); *Illinois Term. R. Co. Abandonment*, 312 I.C.C. 607 (1961); *Penn Central Transp. Co.—Abandonment*, 342 I.C.C. 139 (1972). This is especially the case where alternate transportation is available.

The evidence submitted by Wanda demonstrated a preference for rail service and not a need characteristic of a grain elevator relying upon such service for successful operations. While Wanda indicates it has increased costs because it must utilize trucks, there is no evidence whether this cost results in a loss to Wanda's operations or simply a reduction in profits.

It is interesting to note that while Wanda indicates a preference for rail service by its verified statements, other evidence of record illustrates that Wanda is presently shipping 80 percent of its grain by truck. Moreover, the environmental assessment of the proposed abandonment states that the remaining 20 percent of grain would add only one additional truck per day moving from Wanda. In addition, through its affiliation with Southern Seven Co-op (S-7), which is a large elevator located 22 miles from Wanda on C&NW's mainline track, Wanda could achieve cost reductions on 50 carload shipments by trucking its grain to its affiliate. The cost of trucking the grain to S-7 would be offset by the reduced rates. This evidence is significant since it illustrates that alternate rail service will continue to be available to the community of Wanda via C&NW's mainline at S-7.

One other point, not discussed by the review board, deserves mention here. Incorporated in C&NW's opening statement and evidence is a report and analysis by the Minnesota Rail Planning Committee on the viability of lines in that State proposed for abandonment. Other than identifying the low density lines, the report suggests alternatives for the State to pursue in order to continue service on the line. In its analysis of the Wanda branch line, the report states "there would be little impact of abandonment on employment or sales and the shipping costs would be raised only nominally so that the interests of the railroad would overcome the possible advantage to the one shipper on the line." In table 2 of the report on the Wanda line the State Committee lists abandonment as the alternative providing most benefits and least detriments.

Through the enactment of the Railroad Revitalization and Regulatory Reform Act of February 5, 1976 (4RA) Congress recognized the problem posed by railroads desiring to abandon lines that are unprofitable and the States' desire, in many instances, to continue operation on the line. As a solution to the problem, Congress initiated several Federal programs through which a qualifying State may obtain funds for rehabilitation of a line or to subsidize the continued operation of a line. In our order, which accompanies this report, we have included procedures which the Commission will follow should the State or other interested persons desire to make an offer of subsidy for the continuation of service on the Wanda line. We do not believe, however, in considering the extent of traffic involved, the degree of dependence upon rail transportation, and the changed circumstances of C&NW's financial position, that the applicant may justly be required to continue to bear the loss necessarily entailed by operation of this line.

Subject to the same conditions for the protection of employees as set forth in *Chicago, B. & Q. R. Co. Abandonment,* 257 I.C.C. 700 (1944), we find that the present and future public convenience and necessity permit abandonment by the Chicago and North Western Transportation Company of its line of railroad from milepost 8.8 near Wanda, Minn. to milepost .6 near Sanborn, Minn., a distance of approximately 8.2 miles.

We further find that an Environmental Threshold Assessment Survey has been prepared by this Commission and made available for public inspection upon request; that such survey has found that no significant impact on the environment would result from approval of the application; that, by order of the Commission, Commissioner Brown, served January 6, 1976, it was determined that, based on the aforesaid Threshold Assessment Survey, no environmental impact statement need be issued in this proceeding as it does not represent a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969; that appropriate notice of such determination has been published as directed by this Commission; that said Threshold Assessment Survey is a part of the record in this proceeding and has been weighed in considering the issues herein; and that the environmental factors here are not such as to require denial of this application.

An appropriate order shall be entered.

EX PARTE NO. 275

EXPANDED DEFINITION OF TERM "SECURITIES"

Decided May 13, 1977

1. Found that the regulations as previously amended to require additional information as to the financial condition of the applicant and the lawfulness of its financing operations need not be broadened to the full extent previously announced.
2. Regulations amended and narrowed accordingly.

Richard K. Andrews, Linton E. Barbee, Peter T. Beardsley, Milton H. Bortz, Harry J. Breithaupt, H. Beatty Chadwick, Nelson J. Cooney, Robert J. Corber, Carolyn Cox, Donald E. Cross, R. P. Cunningham, Joseph Ficurelli, Richard J. Flynn, Everett Hutchinson, Thomas E. James, Hewett Johnson, John P. Kelly, L. Gene Lemon, Eugene T. Liipfert, David G. Macdonald, William L. McCracken, Francis W. McInerny, William M. Moloney, Brenda P. Murray, Roland Rice, Henry P. Riordan, Phillip Robinson, C. Ransom Samuelson II, D. Paul Stafford, Mert Starnes, R. A. Stewart, Charles A. Webb, and *Francis M. Wheat* for petitioners.[1]

SUPPLEMENTAL REPORT OF THE COMMISSION UPON FURTHER CONSIDERATION

BY THE COMMISSION:

This proceeding has been reopened upon our own motion for further consideration, on the present record, of our prior order insofar as it adopted amendments to Part 1115 of Subchapter B of Chapter X of Title 49 of the Code of Federal Regulations (the text of which was set forth in appendix C to our report and order of September 5, 1975, 348 I.C.C. 288, at 318). The order issued April 30, 1976, reopening the proceeding, was conditioned upon the approval of the United States Court of Appeals, District of Columbia Circuit, which court has jurisdiction over the pending court proceeding, *Association of American Railroads* v. *United States of America and the Interstate Commerce Commission,* No. 75-2011 and consolidated cases. That approval was granted, and the court litigation held in abeyance, by order of July 1, 1976. The effectiveness of our prior order in this proceeding, including the items discussed herein, has been stayed pending completion of that litigation.

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[1] See appendix for complete listing of petitioning parties.

The amendments consist of the following additions to Form OP-F-200 (formerly Form BF-6), the form for filing section 20a or 214 securities applications.

> *Item 1(c).*—A statement clearly outlining the measures taken by a carrier, and its subsidiaries or affiliates, to insure that compliance with section 10 of the Clayton Antitrust Act (15 U.S.C. 20) has been achieved with respect to the proposed financing and all nonsecurity financing entered into in the current year of the application and the 2 previous calendar years.
>
> *Item 2(d).*—Applicant shall file a list of the amounts, terms, and purposes of all nonsecurity financing for the current year and 2 previous calendar years, by separate category, including, but not limited to, conditional sale contracts, chattel mortgages, security agreements, mortgages, deeds of trust, loan agreements in the nature of standby credit agreements, credit agreements, and advances.
>
> The terms of each category of nonsecurity financing shall include the interest rate, terms of repayment, collateral pledged as security therefor, material restrictions of such arrangements, as well as a detailed breakdown as to the use of the proceeds or credit thus obtained, specifically identifying uses for noncarrier purposes.
>
> *Item 2(e).*—Applicant shall file the following:
>
> (i) Consolidated balance sheet and a consolidated income statement for applicant and its subsidiaries, showing intercompany eliminations.
>
> (ii) A balance sheet and income statement for each of applicant's subsidiaries, or if this is not possible, a statement listing the annual net income and stockholders' equity (net worth) of each of the subsidiaries.
>
> (iii) Applicant's pro forma income statement showing its forecasted revenues, expenses, and net income for the 12 months following the application date.
>
> (iv) Applicant's cash flow statement for the 12 months preceding the filing of the application and its forecasted cash flow statement for the 12 months subsequent to such filing. These statements should show opening cash on hand, receipts by categories disbursements by items, and cash balance at the end of the period, with a breakdown of funds flowing to and from carrier subsidiaries.

Twenty-five of the petitioners for reconsideration of the report and order issued August 16, 1973 (344 I.C.C. 114), objected to one or more of these additions to the application form. In addition, 11 petitioners have filed for reconsideration of the report and order issued September 5, 1975 (348 I.C.C. 288), in opposition to one or more of the application form amendments. The arguments of all of these petitioners (who are listed in the appendix hereto) have received further consideration upon this reopening. Our conclusions as to the merits of the objections to each proposed application form addition are discussed separately below.

Item 1(c)—Compliance with § 10 of Clayton Act

Item 1(c)—A statement clearly outlined the measures taken by a carrier, and its subsidiaries or affiliates, to insure that compliance with section 10 of the Clayton Antitrust Act (15 U.S.C. 20) has been achieved with respect to the proposed financing and all nonsecurity financing entered into in the current year of the application and the 2 previous calendar years.

PETITIONERS' OBJECTIONS

Several complaints were lodged against this requirement. *First,* the carriers point out that the item appears to apply to all noncarrier subsidiaries and affiliates, whereas section 10 of the Clayton Act is only applicable to common carriers. They suggest that it be reworded to clarify that only carrier subsidiary and/or affiliate information is required. *Secondly,* two carriers complain that competitive bidding is expensive and the cause of delays, and, thus, is an undue disturbance to the smooth flow of commerce. They also argue that $50,000 is too low a limit and represents a lower value than in 1914, when the Clayton Act was enacted. *Thirdly,* they comment that only a lawsuit can determine the legal fact of compliance with section 10, that court decisions have written no behavioral patterns for carriers to follow in this area, and that courts have not condemned noncompliance per se, but have inquired into the actual injury to the carrier (citing *Cleary* v. *Chalk,* 488 F. 2d 1314 (D.C. Cir. 1973)). *Fourthly,* it is observed that with respect to those transactions included both in section 10 of the Clayton Act and sections 20a and 214 of the Interstate Commerce Act, the information would merely restate information already obtained in prior securities applications. *Finally,* they argue against the application of the new ICC definition of securities, as announced in our prior report and order, to section 10 of the Clayton Act and maintain that the Clayton Act cannot be so expanded in scope by virtue of the Commission's action in this proceeding.

DISCUSSION AND CONCLUSIONS

The Commission has a statutory duty to perform pursuant to section 10 of the Clayton Act, by investigating possible violations, reporting them to the Attorney General, and submitting therewith the Commission's views or findings on the transaction. Section 10 requires all carriers engaging in transactions encompassed thereby to report them to the Commission within 30 days. With respect to the transaction which is the subject of the immediate securities application, item 1(c) would aid in calling to the attention of carriers the possibility of violations of section 10, and thereby enable the Commission to better monitor the section 10 compliance by discovering possible violations when still avoidable. The Commission has made an effort to discover and prevent potential violations by rail carriers in items 5(c) and (d) of the current securities application form. Item 1(c) would simply be more complete in its coverage. With regard to section 10 transactions not the subject of the immediate securities application, item 1(c) becomes a mere reporting requirement which should be contained in a regularly filed report rather than a securities application.[2] Therefore, we are modifying item 1(c) so that it will only apply to the proposed transaction which is the subject of the securities application.

Section 10 by its terms only applies to transactions between a common carrier and another corporation, firm, partnership, or association when the carrier has a director, president, manager, purchasing or selling officer, or agent in the particular transaction, who is at the same time a director, manager, or purchasing or selling officer of, or has a substantial interest in, the other party to the transaction. In order to eliminate any possible confusion on the part of the applicants, item 1(c) will be amended to reflect the scope of section 10 in this respect.

Section 10 is further limited to "dealings in securities, supplies or other articles of commerce, or ***contracts or construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year." The Commission's expanded definition of securities for purposes of sections 20a and 214 of the Interstate Commerce Act should not affect the normal judicial interpretation of the above-quoted Clayton Act language. In sections 20a and 214 securities applications, the carrier has the opportunity to establish that the proposed issuance for which it seeks approval without competitive bidding is not subject to section 10, as interpreted by the courts.

The petitioners' complaints against the competitive bidding process and the statutory dollar limitation are directed against section 10 of the Clayton Act itself, not against the inclusion of this information in ICC securities applications. The Commission itself has been critical of the coverage of section 10. In its 1954 and 1955 Annual Reports to Congress, the Commission recommended that transactions between parent corporations and their wholly owned subsidiaries be exempted from section 10 of the Clayton Act. That recommendation was never enacted. In its 1958 and 1959 Annual Reports to Congress, the Commission further recommended that the dollar limitation on the statutory exemption be increased to a more realistic amount in light of the then current costs of doing business. That recommendation was also never enacted. Therefore, the Commission must continue to perform its function under the statute as written.

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[2] By order issued October 2, 1975, in No. 36147, *Addition of a Schedule to the Annual Reports for Reporting of Competitive Bidding—Clayton Antitrust Act Transactions*, all railroads, class I motor carriers of passengers, and classes I and II motor carriers of property are required to submit summarizing information as to all section 10 transactions (security and nonsecurity) in their annual reports.

Item 2(d)—Prior nonsecurity financing

Item 2(d).—Applicant shall file a list of the amounts, terms, and purposes of all nonsecurity financing for the current year and 2 previous calendar years, by separate category, including, but not limited to, conditional sale contracts, chattel mortgages, security agreements, mortgages, deeds of trust, loan agreements in the nature of standby credit agreements, credit agreements and advances.

The terms of each category of nonsecurity financing shall include the interest rate, terms of repayments, collateral pledged as security therefor, material restrictions of such arrangements, as well as a detailed breakdown as to the use of the proceeds of credit thus obtained, specifically identifying uses for noncarrier purposes.

PETITIONERS' OBJECTIONS

One petitioner suggests that this item be clarified as only applicable to the financing of the applicant carrier and not to its related companies. The same petitioner also seeks a clarification that only those transactions not subject to section 20a or section 214 need be reported. Two petitioners charge that the information sought by item 2(d) is repetitive of information contained in annual reports or prior securities applications. They suggest that item 2(d) be amended to require such information only to the extent not previously filed with the Commission and to provide for incorporation by reference of the previously filed material.

DISCUSSION AND CONCLUSIONS

Item 2(d) was inserted by the March 22, 1972, report and order (340 I.C.C. 817), prior to the redefinition of securities, as the only means of learning about transactions now deemed to be security transactions. In fact, in describing the "nonsecurity financing" anticipated to be included, the 1972 report and order listed "conditional sale contracts, chattel mortgages, security agreements, mortgages, deeds of trust, loan agreements in the nature of standby credit agreements, credit agreements, and advances." 340 I.C.C. at 825. These would all be deemed to be security transactions by the later reports and orders in this proceeding. Hence, item 2(d) is being reconsidered in a different context from that in which it was adopted.

When item 2(d) was first adopted, we stated that "a primary purpose of section 20a was to prevent carriers from becoming overcapitalized by requiring them at the time of filing a section 20a application to lay the full facts of their financial situation before us." 340 I.C.C. at 824. The Commission certainly would not have an accurate portrayal of the applicant's financial posture, if, for example, it is unaware of credit agreements which have not yet been drawn upon completely. Furthermore, we explained that, in order to make the requisite statutory findings in a section 20a or 214 application:

> [i]t is incumbent on us *** to give major consideration to the use which the carriers have made of their credit arrangements which did not involve the issuance of securities, to determine whether such credit was used prudently and therefore is not inimical to the purposes of section 20a (or 214) applications. [340 I.C.C. at 824.]

As redefined, the term "securities" will cover all the transactions to be included under item 2(d). However, this item will be retained for an interim period to cover nonsecurity financing that predates the effectiveness of the redefinition of securities.

The petitioner who comments that item 2(d) is only applicable to the carrier applicant and only extends to transactions not subject to sections 20a or 214 is correct. The request for a provision for incorporation by reference of previously filed information is reasonable. The Commission has no desire to create excessive paperwork and needlessly bulky applications. Therefore, applicants will be allowed to incorporate by reference prior nonsecurity financing information contained in previous securities applications. Applicants subject to the Corporate Disclosure Regulations imposed in docket No. 36141 may also incorporate by reference information submitted in the annual report in response to section III, when applicable.

Item 2(e)(i)—Consolidated Statements

> *Item 2(e).*—Applicant shall file the following: (i) Consolidated balance sheet and a consolidated income statement for applicant and its subsidiaries, showing intercompany eliminations.

PETITIONERS' OBJECTIONS

No petitioner objected to the submission of consolidated financial statements. The main objection to item 2(e)(i) is to the requirement that intercompany eliminations be shown. Greyhound Corporation (Greyhound) claims that to show intercompany eliminations, its consolidated balance sheet would contain approximately 130 columns. Also, in order to comply, Greyhound states that it would have to abandon its system of subconsolidations made in the field. (It mentions that it could prepare summaries of the eliminations.) The National Association of Motor Bus Owners (NAMBO) suggests that the consolidated statements be required to reflect, rather than show, these intercompany eliminations. The Association of American Railroads (AAR) argues that intercompany eliminations are of no material benefit, as they are "matters which have no bearing on the financial transactions committed to the Commission's jurisdiction."

The AAR also points out that item 2(e)(i) does not specify the date of the balance sheet or the period of the income statement required; nor does it identify the accounting principles to be applied—generally accepted accounting principles (GAAP) or the ICC Uniform System of Accounts (USA). It suggests that the Commission adopt the same dates and periods used in Ex Parte No. 279, *Securities Regulations—Public Offerings*, 344 I.C.C. 168, at 221 (1973).[3]

DISCUSSION AND CONCLUSIONS

The purpose of requiring consolidated statements is to enable the Commission to view the entire corporate family as an economic unit. Any investor judging a company's abilities and qualities would view a company from that perspective. Petitioners have no objection to this. However, they argue that the requirement that intercompany eliminations be shown is burdensome. Again, we emphasize that the Commission does not wish to proliferate its paperwork or to burden carriers unnecessarily. We are satisfied that the separate subsidiary financial material to be required by item 2(e)(ii) will satisfy our objectives. Therefore, we will delete the intercompany eliminations requirement altogether.

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[3] Rail carriers subject to the jurisdiction of the Securities and Exchange Commission were excluded from the requirements of Ex Parte No. 279, by Supplemental Order of March 24, 1976. However, the rules promulgated in that proceeding continue to apply to motor carriers.

The suggestion that the accounting dates and periods for the consolidated financial statements be identical to those required for offering circulars in Ex Parte No. 279, is reasonable with respect to applications to which Ex Parte No. 279 is applicable, and applicants in that situation will probably choose to follow the suggestion. However, in applications in which an offering circular in conformance with Ex Parte No. 279 is not required, the accounting dates and periods for the consolidated financial statements should correspond to those of the applicant's financial statements submitted in items 2(a) and (c).

As to the accounting principles to be followed, carriers should conform to the USA, while their noncarrier subsidiaries may employ their normal accounting procedures, so long as they represent GAAP. In combining the statements, applicant should indicate the differences reflected between the two accounting systems by footnote.

Item 2(e)(ii)—Subsidiary Statements

(ii) A balance sheet and income statement for each of applicant's subsidiaries, or if this is not possible, a statement listing the annual net income and stockholders' equity (net worth) of each of the subsidiaries.

PETITIONERS' OBJECTIONS

The AAR claims that the requirement of unconsolidated financial statements for all subsidiaries is also a substantial burden without a material benefit. It states that it is "at best questionable whether financial data on individual carrier subsidiaries will assist the Commission in making findings mandated in section 20a." NAMBO argues that, in the absence of a showing of need for different information, the Commission requirements should be consistent with those of the Securities and Exchange Commission (SEC). The SEC requires subsidiary financial statements on a consolidated basis and does not require that "insignificant" subsidiaries (as defined by the SEC) be included.

The AAR also raises the same questions as to accounting dates, periods, and principles as in item 2(e)(i) above.

DISCUSSION AND CONCLUSIONS

Again to avoid an unnecessary burden on both applicants and the Commission, we will not require that any carrier submit separate subsidiary financial statements, except when specifically requested.

Instead, for each subsidiary, we will simply require a description of the nature of the company's business and a statement listing its annual net income and the stockholders' equity (net worth). Also, we will require the applicant to separately set forth its net investment in each subsidiary.

Separate subsidiary financial information, by outlining the component parts of the economic whole, both explain and amplify the consolidated statements. The corporate structures are not delineated on the consolidated financial statements. The separate subsidiary information requested would serve that function, as well as indicating the interrelations of the various corporate members. It should be added that the Commission may justifiably request different information than that sought by the SEC. The SEC is only concerned with full and fair disclosure to the investor. The Commission, on the other hand, is charged with overseeing the quality of the securities issuance or assumption; the Commission must insure that the carrier's continuing ability to serve the public is preserved.

Items 2(e)(iii) and (iv)—Forecasts

(iii) Applicant's pro forma income statement showing its forecasted revenues, expenses, and net income for the 12 months following the application date.

(iv) Applicant's cash flow statement for the 12 months preceding the filing of the application and its forecasted cash flow statement for the 12 months subsequent to such filing. These statements should show opening cash on hand, receipts by categories, disbursements by items and cash balance at the end of the period, with a breakdown of funds flowing to and from carrier subsidiaries.

PETITIONERS' OBJECTIONS

The requirement that carriers submit a financial forecast for the 12-month period following the date of the application is unquestionably the most controversial of the additions to the securities application. Petitioners *first* object that it represents an attempt to obtain indirectly what was denied the Commission directly in *Burlington Northern, Inc.* v. *I.C.C.*, 462 F. 2d 280 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 891 (1972). In that proceeding, it was held that the Commission's power of inspection under section 20 of the Interstate Commerce Act does not extend to budget and income forecasts. It is argued that the Commission's power under sections 20a and 214 of the act can be no greater than its power under section 20.

Secondly, petitioners strenuously object that the forecast requirement would subject the carriers to severe legal risks. They argue that the forecast information would be open to public inspection and that, therefore, the carriers would be under a duty to widely disseminate that information. The carriers would also be required to disclose the assumptions on which the forecasts were prepared, including confidential plans and strategies. The forecasts would then have to be revised for the public as the circumstances under which they were prepared altered; these revisions would have to be both timely and accurate.

The forecasts would tend to mislead unsophisticated investors, who would accord unwarranted credence to them, it is argued. Petitioners state that it is contrary to the interest of investors and of carriers to have the stock trading prices influenced by forecasts other than of results clearly in view. They also express the fear that this disclosure would subject carriers to potential liability under the securities laws and the Banking Act, as well as common law and State law liability, if their performance varied materially from the forecasts. It is argued that liability may attach whether the forecasts are too optimistic or overly pessimistic; however, carriers would probably seek to avoid liability by being conservative in their forecasts. Such conservatism could adversely affect their ability to obtain financing; it could also dampen the management stimulus, it is suggested.

Thirdly, petitioners argue that, even disregarding the expense of potential lawsuits, the expense to the carriers of generating these forecasts would be out of proportion to their utility as and aid to financial planning or to regulation. (Greyhound estimates that the preparation of each annual forecast would cost it $400,000.) Such forecasts are not essential to the Commission's regulatory purpose and therefore constitute an unnecessary administrative burden and expense, petitioners maintain.

In support of this argument, petitioners point to the inherent weaknesses of forecasts. Forecasts, they say, are based on subjectivity and a large number of assumptions. They are prepared in various forms for management personnel who are aware of all the modifications and contradictions that may arise. They are usually designed to establish performance goals rather than to predict actual results. At best, they offer only an educated guess. The American Trucking Associations, Inc., claims that forecasts are more difficult for motor carrier transportation than for other industries because of the "greater variables." These variables "stem primarily from its regulation and its heavily organized union, thereby making it extremely difficult to pin down freight rates and labor and fringe costs." Forecasts would not produce meaningful data, petitioners argue. They urge the Commission to continue to use a carrier's past experience to judge its ability to meet fixed charges.

Petitioners point to the actions of the Federal Power Commission (FPC) and the SEC. In 1973, the FPC declined to adopt a proposed rule that would require regulated utilities to include a financing requirements forecast in their annual reports. The FPC found that such forecasts "are *** both speculative and inaccurate" and "would be, at best, misleading and uniformative in any meaningful way." It also expressed concern that the disclosure of such forecasts would hinder the regulated companies in their efforts to compete in the money market for the use of investment capital. 38 F.R. 13491-13492.

The SEC in 1973 issued a policy statement expressing an intention to permit voluntary projections by a limited group of issuers, so long as the material was disseminated to the public generally and was updated both regularly and in the event of material changes in the projections. Securities Act Release No. 5362. The SEC further announced its intention to develop "safe harbor" rules for the preparation of the projections, which rules would protect the issuer from potential liability. In 1975, the SEC published proposed rules to implement the earlier policy statement. Securities Act Release No. 5581. However, in April of 1976, the SEC announced that "due to the important legal disclosure policy and technical issues raised by the commentators," it was withdrawing the proposed rules. Securities Act Release No. 5699. The announcement further stated that the SEC "is neither encouraging or discouraging the making and filing of projections because of the diversity of views on the importance and reliability of projections." The statement added that:

> Although it has withdrawn the proposed safe harbor rules for projections, the Commission is of the view that reasonably based and adequately presented projections should not subject issuers to liability under the federal securities laws, even if the projections prove to be in error.

(NAMBO suggests that the Commission require forecasts only if the carrier has filed forecasts with the SEC or has otherwise made public forecasts.)

A *fourth* criticism of the forecasting requirement as imposed by items 2(e)(iii) and (iv) is that the 12-month period following the date of the application is an unreasonable time frame. No carrier prepares a moving 12-month forecast, according to petitioners. A carrier could not prepare the required forecasts by merely dropping and adding a comparable period of time to an earlier prepared forecast; the previous forecast would require a complex and time-consuming update. AAR suggests that, if the requirement is retained, it be modified to permit the filing of the carrier's most recent forecast prepared for business purposes, together with a statement of any known material changes.

The AAR also complains that no standards have been developed for the preparation of these forecasts. Finally, the AAR remarks that since there is no uniform time for submission, comparisons will be difficult. In the same vein, Greyhound suggests that necessary additional financial information be obtained on a regular basis, and not as part of a securities application bearing no relationship to any meaningful accounting period.

Discussion and Conclusions

Although we have determined to withdraw the forecasting requirement, we are not doing so out of any doubt as to the Commission's power to require that information. As we noted in Ex Parte No. 290, *Procedures Governing Rail General Increase Proc.*, 351 I.C.C. 544 (1976), the *Burlington Northern* proscription is limited to the Commission's inspection powers under section 20. With respect to the forecasts required in this proceeding, the Commission may rely not only on its section 12(1) broad regulatory powers, but also on section 20a(4), which provides that "[e]very application for authority shall be made in such form and contain such matters as the Commission may prescribe."

We are withdrawing the forecasting requirement because we are not convinced that the benefits to be derived from such information, in the context of securities applications, would outweigh the burdens of requiring this material. For the limited purpose of analyzing proposed securities issuances, the Commission can construct short-term forecasts from the other required financial information submitted. Applicants are reminded that they have a duty under principles of sound accounting to reveal any significant changes in their operations that have already occurred or that are definite in appropriate notes to the financial statements. Any other potential changes would probably be too speculative and an improper basis for a determination of this nature. The added cost to the carrier of developing this forecast material and the burden to the administrative process of the additional paperwork are not justified by a strong need for the information.

Our conclusions upon weighing the benefits and burdens of the forecasting requirements are restricted to the context of this proceeding and do not speak to the merits of the proposed forecasting requirement in Ex Parte No. 290, where different benefits and burdens are present.

The requirement that the applicant submit a cash flow statement covering the preceeding year has been retained for its usefulness in the Commission's analysis of the applicant's cash requirements. The Commission would be better able to judge the carrier's need for the proposed financing and the effect of that financing on its cash requirements with this information.

FINDINGS

We find that, for the reasons stated above, to improve the regulation of future transactions under sections 20a and 214 of the Interstate Commerce Act, the additions to the sections 20a and 214 applications previously ordered in this proceeding should be modified. Specifically, we find that item 2(e)(iii) should be deleted and that item 2(e)(iv) should be renumbered as item 2(e)(iii).

We find that the additions to Form OP-F-200 should be further amended and modified as follows:

Item 1(c).—Is any director, president, manager, purchasing or selling officer, or agent, of the applicant in the particular transaction which is the subject of this application also a director, manager, purchasing or selling officer, or the owner of a substantial interest in any other party to the transaction?

If so, include a statement clearly outlining the measures taken to insure that compliance with section 10 of the Clayton Antitrust Act (15 U.S.C. 20) has been achieved with respect to the proposed financing.

Item 2(d).—Applicant shall file a description of the amounts, terms, and purposes of all nonsecurity financing for the current year and 2 previous calendar years, by separate category.

The terms of each category of nonsecurity financing shall include the interest rate, terms of repayment, collateral pledged as security therefor, material restrictions of such arrangements, as well as a detailed breakdown as to the use of the proceeds or credit thus obtained, specifically identifying uses for noncarrier purposes.

Information contained in prior applications and information supplied in the Annual Report in response to section III of the Corporate Disclosure Regulations, where applicable, may be incorporated by specific reference.

Item 2(e).—Applicant shall file the following:

(i) Consolidated balance sheet and a consolidated income statement for applicant and its subsidiaries. The dates should correspond to those used in the statements submitted for (a) and (c) above.

(ii) A statement describing the nature of the business of each of applicant's subsidiaries, and a statement listing the annual net income and stockholders' equity (net worth) of each of the subsidiaries. Also, applicant shall furnish a schedule showing its net investment in each subsidiary as of the date of its balance sheet statement.

(iii) Applicant's cash flow statement for the 12 months preceding the filing of the application. This statement should show opening cash on hand, receipts by categories, disbursements by items, and cash balance at the end of the period, with a breakdown of funds flowing to and from carrier subsidiaries.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

COMMISSIONER GRESHAM, concurring in part:

As indicated in my dissent to the prior report of the Commission in this proceeding (348 I.C.C. 312-313), I did not join the majority in adopting forecast reporting requirements. Although I now gladly join the majority in withdrawing those requirements, I must register my disagreement with the majority's optimistic opinion to the effect that there is no doubt that the Commission could require forecast information if it were disposed to do so. Personally I adhere to the position that the Commission has no authority to delve into management forecast data, and that this question has been resolved unequivocally in *Burlington Northern, Inc.* v. *I.C.C. et al.*, 323 F. Supp. 273, affirmed 462 F. 2d 280, *cert den.*, 409 U.S. 891 (1972).

APPENDIX

Petitioners for reconsideration of 1973 report and order

American Trucking Associations, Inc.
Arkansas Best Corporation
Arkansas-Best Freight System, Inc.
Association of American Railroads
Brown Express, Inc.
C&H Transportation Co., Inc.
Central Express, Inc.
Central Freight Lines, Inc.
Crouch Bros., Inc.
Greyhound Corporation
Greyhound Lines, Inc.
Johnson Motor Lines, Inc.
McLean Trucking Company
Merchants Fast Motor Lines

Merchants, Inc.
National Association of Motor Bus Owners
O.N.C. Freight Systems
Pacific Intermountain Express Co.
Ryder System, Inc.
Ryder Truck Lines, Inc.
Saia Motor Freight Line, Inc.
Smith's Transfer Corporation
Tyler Corporation
Wilson Freight Company
Yellow Freight System, Inc.

Petitioners for reconsideration of 1975 report and order

Arkansas Best Corporation
Arkansas-Best Freight System, Inc.
C&H Transportation Co., Inc.
Consolidated Freightways Corporation of Delaware
Consolidated Freightways, Inc.
Continental Trailways, Inc.
Merchants Fast Motor Lines, Inc.
Merchants, Inc.
TCO Industries, Inc.
Tyler Corporation
Yellow Freight System, Inc.

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER B - PRACTICE AND PROCEDURE
PART 1115 - ISSUANCE OF SECURITIES, ASSUMPTION OF OBLIGATIONS AND FILING OF CERTIFICATES AND REPORTS

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D.C., on the 13th day of May 1977.

Ex Parte No. 275

EXPANDED DEFINITION OF TERM "SECURITIES"

The matters involved in this proceeding having been further considered, for the limited purpose set forth in the order of April 30, 1976, and the Commission, on the date hereof, having made and filed a report setting forth its conclusions and findings and reasons therefor, which report is hereby referred to and made a part hereof:

It is ordered, That Part 1115 of Subchapter B of Chapter X of Title 49 of the Code of Federal Regulations be, and it is hereby, amended by deleting item 2(e)(iii) of Form OP-F-200 (formerly Form BF-6) referred to in part 1115.1, redesignating item 2(e)(iv) of Form OP-F-200 as item 2(e)(iii), and amending the following items of Form OP-F-200 to provide:

Item 1(c).—Is any director, president, manager, purchasing or selling officer, or agent of the applicant in the particular transaction which is the subject of this application also a director, manager, purchasing or selling officer, or the owner of a substantial interest in any other party to the transaction?

If so, include a statement clearly outlining the measures taken to insure that compliance with section 10 of the Clayton Antitrust Act (15 U.S.C. 20) has been achieved with respect to the proposed financing.

Item 2(d).—Applicant shall file a description of the amounts, terms, and purposes of all nonsecurity financing for the current year and 2 previous calendar years, by separate category.

The terms of each category of nonsecurity financing shall include the interest rate, terms of repayment, collateral pledged as security therefor, material restrictions of such arrangements, as well as a detailed breakdown as to the use of the proceeds or credit thus obtained, specifically identifying uses for noncarrier purposes.

Information contained in prior applications and information supplied in the Annual Report in response to section III of the Corporate Disclosure Regulations, where applicable, may be incorporated by specific reference.

Item 2(e).—Applicant shall file the following:

(i) Consolidated balance sheet and a consolidated income statement for applicant and its subsidiaries. The dates should correspond to those used in the statements submitted for (a) and (c) above.

(ii) A statement describing the nature of the business of each of applicant's subsidiaries, and a statement listing the annual net income and stockholders' equity (net worth) of each of the subsidiaries. Also, applicant shall furnish a schedule showing its net investment in each subsidiary as of the date of its balance sheet statement.

(iii) Applicant's cash flow statement for the 12 months preceding the filing of the application. This statement should show opening cash on hand, receipts by categories, disbursements by items, and cash balance at the end of the period, with a breakdown of funds flowing to and from carrier subsidiaries;

It is further ordered, That the effective date of the report and order of the Commission of September 5, 1975 (348 I.C.C. 288) as herein further modified, in conformity with the order of October 21, 1975, be, and it hereby, stayed pending further order of the Commission;

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy of this notice in the Office of the Secretary of this Commission at Washington, D.C., and by filing a copy with the Director, Office of the Federal Register.

No. 36141

CORPORATE DISCLOSURE REGULATIONS

Decided May 13, 1977

Upon investigation and consideration of views, arguments, and representations of the parties, certain revised reporting regulations governing certain carriers subject to our reporting rules (1241, 1249, 1250, 1251) are adopted to be effective for the year ending December 31, 1977.

J. E. Adkins, Victor Anderson, Paul Angenend, Richard Battles, John Becraft, Leigh Beins, Eldered Bell, Jr., W. J. Berberich, B. J. Bledsoe, C. J. Boddington, Milton H. Bortz, Robert R. Brinker, Roger T. Burbage, E. E. Busche, John Cunningham, John Delany, Walter K. Ellis, R. J. Evans, R. Frederic Fisher, J. W. Gieseler, Peter Greene, J. D. Hagen, Thomas Harper, T. P. Hawkins, W. M. Holsberry, J. E. Holubec, Donald Holzinger, Peter Howard, Everett Hutchinson, Neal A. Jackson, Thomas E. James, Lawrence Kahn, T. W. Kidd, James Kinzer, Robert O. Koch, W. A. Koerner, U. J. LeGrange, Eugene T. Liipfert, C. S. McAnally, W. L. McCracken, Janes T. McDeavitt, Norman McMurry, Charles R. Marcoux, Jr., Dean Markle, Norman Marshall, Raymond Merrill, T. R. Miller, D. E. Moffitt, George M. Moran, Joseph Nagle, C. L. Packard, Kenneth Pasch, Ralph A. Pipp, Warren Price, Jr., Priscilla Rassin, Phillip Robinson, E. W. Sandygren, Ephraim Schaefer, David B. Schneider, Robert Seaks, Bobby G. Shaw, J. G. Springer, Mert Starnes, William Taylor, Starr Thomas, W. B. Thomas, Jr., R. C. Thompson, Walter G. Treanor, Louis Violetti, Jr., M. Lauck Walton, Steven Weiman, Donald L. Werst, Edward Wheeler, Donald Wooden, and *Hubert Work* for certain carriers.

Senator Lee Metcalf, Chairman, Vic Reinemer, E. Winslow Turner, and *John B. Chesson* for the Subcommittee on Reports, Accounting, and Management, Committee on Government Operations of the United States Senate.

Peter Beardsley, Harry Breithaupt, Jr., Nelson Cooney, J. Donald Durand, John S. Fessenden, Robert James, and *Charles Webb* for certain industry associations.

William E. Kenworthy for the Rocky Mountain Motor Tariff Bureau, Inc.

Raymond Kurlander for the Civil Aeronautics Board.

George T. Wright for the North Dakota Public Service Commission.

Robert Kane and *Gordon MacDougall* for the Commonwealth of Pennsylvania.

John Donelan, C. W. Bath, Donald Frederick, Donald Graham, James Krzyminski, Paul C. McQuiston, John Maser III, Stanley Moore, Edwin Wheeler, and *Frederic Wood* for certain shipper associations.

Markley Roberts for the American Federation of Labor and Congress of Industrial Organizations.

Robert L. Bevan, Charles W. Bissett, and *Martin F. Shea* for the American Bankers Association.

Robert E. L. Walker for Continental Illinois National Bank and Trust Company of Chicago.

Irene Till for the Corporate Accountability Research Group.

Michael Locker, Robert Seltzer, and *Steve Albrecht* for Corporate Data Exchange, Inc.

A. D. Safford for Safford, Porter & Associates, P.C., Certified Public Accountants.

Kenneth B. Williams for Richardson and Tyler, Counselors at Law.

Walter Adams, Julius W. Allen, Virgil Edward Duncan, Leroy Hallman, Richard M. Hull, John T. Schell, H. L. Severance, and *Robert M. Soldofsky* as interested individuals.

David Cohen, Mimi Cutler, Alice Tepper Marlin, Leon Shull, and *Tim Smith* for certain consumer groups.

REPORT OF THE COMMISSION

BY THE COMMISSION:

By Notice of Proposed Rulemaking served under docket No. 36141 on April 1, 1975, and published in the Federal Register on April 7, 1975 (40 F.R. 15402), the Commission announced it had under consideration revisions to certain reporting regulations (49 CFR, parts 1241, 1249, 1250, 1251) prescribed for all modes of transportation under its jurisdiction. These revisions relate to adoption by this Commission of specific items of corporate disclosures pertaining to corporate structure, voting stock ownership, affiliations of officers and directors, and debtholdings. All interested parties were originally given the opportunity to submit their views in writing by May 5, 1975. This date was subsequently extended to June 20, 1975.

BACKGROUND

The basic issue surrounding corporate disclosure is the lack of knowledge about those who actually own or control regulated companies. This Commission needs timely information on ownership and control to help identify possible conflicts of interest, misuse of insider information, exertion of undue influence facilitated by concentration of control, and other possible problems contrary to the public interest.

At the suggestion of the General Accounting Office and members of the Senate Government Operations Committee, an Interagency Steering Committee on Uniform Corporate Reporting was established on June 3, 1974. The Steering Committee included senior staff from the following agencies:

Civil Aeronautics Board
Federal Communications Commission
Federal Maritime Commission
Federal Power Commission
Federal Trade Commission
Interstate Commerce Commission
Securities and Exchange Commission
Federal Energy Administration
Federal Reserve System
General Accounting Office
Senate Subcommittee on Budgeting, Management and Expenditures (now the Subcommittee on Reports, Accounting and Management)

In January 1975, the Steering Committee released its Model Corporate Disclosure Regulations dealing with corporate structure, voting stock ownership, affiliations of officers and directors, and debtholdings. The reporting requirements represented the consensus of the members of the committee and, in many instances, were based upon extensive hearings and studies conducted by Senator Lee Metcalf, Chairman, Subcommittee on Reports, Accounting and Management.

In a letter to agency heads, dated January 24, 1975, published in the Congressional Record of January 27, 1975, Senator Metcalf recommended that the Federal regulatory agencies adopt these model regulations. In response to that recommendation, this

Commission published a Notice of Proposed Rulemaking on April 1, 1975, containing regulations identical to the model regulations with two exceptions:

1. The dollar limitation on debt disclosure was eliminated from the model since the Commission already obtains disclosure on all debt from carriers.
2. The dollar limitation on disclosure of contracts between reporting carriers and any business or financial organization affiliated with its (the reporting carrier's) officers and directors was dropped from $1 million to $50,000 to conform with section 10 of the Clayton Antitrust Act.

There were 76 respondents to our notice. Since many respondents requested clarification of the proposed regulations, we scheduled an informal conference to provide interested parties the opportunity to present their views and comments on the proposal. We published in the Federal Register on October 29, 1975, a Notice of Informal Conference to notify all interested parties of this conference.

The conference was held January 13, 14, and 15, 1976. On February 5, 1976, the Commission published in the Federal Register (41 F.R. 5381), a Request for Comments concerning testimony given at the conference. Interested parties had until March 15, 1976, to submit their comments. (See appendix A for respondents and participating parties.)

REASONS FOR THE REGULATIONS

A summary of a representative selection of the written and oral comments received is set forth in appendix B. The appendix does not include the comments of Senator Metcalf and other representatives of the Senate Subcommittee on Reports, Accounting and Management (the subcommittee), who were the principal supporters of the regulations.[1] Since the subcommittee was the moving force behind our proposing the regulations, it is appropriate to set forth at this point the representations of Senator Metcalf and the other subcommittee representatives.

The principal contention of the subcommittee's representatives is that every regulatory agency should have, on a current basis, a detailed description of the structure and activities of companies subject to its jurisdiction and that such description should logically include information that reveals who owns or controls the company and what the company itself owns or controls. That information must, they maintain, be available to the public as well as the agency staff and be collected in one easily accessible place. Current reporting requirements of this agency, as well as others, are viewed as being not adequate.

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[1] Other parties with varying degrees of support for the proposed regulations appeared. Their arguments, however, are either very general, repetitious of those of the subcommittee representatives, or directed specifically to a particular point of personal interest. A representative sampling of those positions are included in appendix B. Those parties include: Americans for Democratic Action; Common Cause; Commonwealth of Pennsylvania; Corporate Accountability Research Group; Farmland Industries; The Fertilizer Institute; International Minerals & Chemical Corporation; National Council of Farmer Cooperatives; National Industrial Traffic League; and The North Dakota Farmers Union.

The first section of the proposed regulations entitled "Corporate Structure" (section I of the regulations adopted herein—see appendix C.) is defended by the subcommittee representatives on the grounds that such information will allow the Commission, and any interested party, to trace the lines of potential policy control and show to what extent those lines may lead to industrial concentration or to a competitive policy. It is also alleged that such reporting will show the degree to which a carrier may be in a position "to abuse the common carrier privilege." Commission authority for such action is clear, in the view of the proponents. Sections 12(1) and 20(5) of the Interstate Commerce Act are cited, along with an argument proposing that this proceeding be used as a vehicle to implement a broader interpretation of section 5 insofar as it relates to holding companies and parents controlling carriers.

Section II of the proposed regulation (see appendix D), pertaining to voting stock ownership information, is deemed critical by the subcommittee chief counsel for a clear understanding of the extent and nature of control in the transportation industry. Many major carriers have been absorbed into holding company systems or have become involved in joint ventures put together by large multinational corporations. "Bigness is rampant in the industry," he charges, "and the Commission has done little to stop it, much less to regulate it." Specific examples of adverse consequences are not set forth, however, except that of the Penn Central bankruptcy.

An expansion by the Commission of its inspection authority and reporting requirements into holding company activities, as set forth in section II, is the perceived answer to the problem. It is contended that the information requested is available to any company that will take the time to find it, through financial publications, filings with other agencies, and the company's own records. In actuality, it is urged, the imposition of voting stock ownership information will impose no undue burden but would instead be beneficial to corporate management as an aid in communication between company and shareholders.

Support by the subcommittee representatives for section III of the proposed regulations, pertaining to the affiliations of officers and directors (section II of appendix C), is based upon a theory that interlocking officerships and directorships may be the most direct way of controlling and influencing carrier management and corporate policy. Examples were submitted which purport to show that the officers and/or board members of several large rail carriers also sit on the boards of major banks, insurance companies, suppliers of equipment, and other major business entities. The potential for abuse is deemed to be a violation of a carrier's "privilege" or "franchise" to operate.

It is also argued by the subcommittee staff that paragraphs A and B of this section do not require the disclosure of any information not now reported or easily available to the carriers. Sections C and D are alleged to provide necessary current information on the degree and mode of intercompany dealings and special contractual or other business relationships between a respondent and its officers or directors. Admittedly, some of this information may be reported or filed at other agencies. However, the proponents argue that these sections of the proposed regulations will gather all of that information together and allow this Commission or the public to observe the pattern of business and professional relationships between a respondent and those companies with which it is interlocked, and also between a respondent and its own officers and directors. For the most part, the supporters of these sections of the proposed regulations do not dwell upon any particular subparagraph, but urge that the entire section be adopted as written.

Debtor-creditor relationships, the subject of part IV of the proposed regulations (part III of appendix C), are termed "significant levers of corporate control" by counsel for the subcommittee. It is his argument that no reporting system intended to measure corporate control can be effective unless it encompasses the creditors of corporations. Creditors are charged with being able to limit normal corporate activities through contractual restrictions contained in loan indentures since violation of any restrictions may activate default provisions included in the loan instruments for the benefit of creditors. The result, continues the argument, may be that creditors are in the position to exact conditions from management in return for their cooperation in not pursuing legal or contractual remedies.

The threat of losing credit and the resultant effect on financing present and future operations, as well as the threat of losing management control, is alleged to force management to act with caution and deference when dealing with their bankers. Accordingly, it is argued, the borrower will accept restrictions regarding his financial condition, disposition of assets, management structure, or any other matter which may be governed by a legal contract.

Should default occur, the argument continues, experience shows that it is the creditor which then assumes the active management role with the singular purpose of recouping any losses—real or imagined. By way of example, evidence was submitted in the form of Senate testimony by Senator Metcalf which purports to show how a consortium of banks has been able to gain actual operational control of a large corporation from their role as primary creditors after default. The example details how the corporation's overseas investments were nationalized, forcing the corporation to default on a large revolving credit note after insurance proved inadequate. The subsequent effect, according to proponents, was that the corporation accepted the demands of creditors and accepted new directors proposed by those creditors. The newly enlarged board of directors then allegedly began giving priority in corporate financial matters to the satisfaction of outstanding long-term debt. This new corporate program will allegedly defer the purchase of needed capital assets by the corporation of productive plant equipment and severely hamper the freedom of management.

The conclusion reached by subcommittee supporters of this section is that it is a serious oversight by regulatory bodies not to require timely and periodic reporting of major corporate debt holdings, including public debt offerings. The creditor, they conclude, is a potential threat to the continued economic health of American business that has been long neglected, and one that must be closely watched to ensure proper regulations and public protection.

Appendix B includes a summary of the objections to adoption of the regulation. Certain specific objections dominated the responses and we will proceed to discuss these.

DISCUSSION AND CONCLUSIONS

A substantial majority of those commenting on the regulations contend that the Commission lacks authority to adopt them. The challenge to the Commission's authority is not directed equally at all parts of the regulations. There was general acquiescence in the

Commission's authority to require additional information with respect to outstanding debt of the respondent carrier under the section on "Debtholdings," with most objections on this section being directed at the burden of supplying the information. While many objections were raised as to the Commission's authority under section II, "Voting Stock Ownership," the burden of the complaints related to the feasibility of the carrier obtaining the required information. Objections to these two sections will be discussed below.

COMMISSION AUTHORITY

The question of the Commission's statutory authority was raised consistently in comments on the remaining sections, "Corporate Structure" and "Affiliations of Officers and Directors." "Corporate Structure" essentially asks for the following information about organizations controlling, or controlled by, the carrier respondent: name and address; basis of control; a description of the principal business activities; and a balance sheet and income statement (including consolidated statements, if available). In addition, this section requires the filing of a chart showing the relationship of the affiliated companies and the naming of any business organization in which the respondent carrier owns more than 5 percent of the outstanding securities. "Affiliations of Officers and Directors" requires the following information with respect to each principal officer and each director, trustee or partner of the respondent and each organization controlling respondent: his occupation and affiliations with other businesses; a description of any dealings between the carrier and such affiliated businesses which exceed $50,000; and a description of any dealings in excess of $600 between the named individuals and the carrier (other than salary from the carrier) or involving professional services rendered the carrier by organizations affiliated with the named individuals.

It is our view that we clearly have the statutory authority to require that the information described above be reported to us for the scrutiny of our staff, congressional committees, and the public. Before setting forth our reasons for this conclusion, we will respond to the objection that we may be requiring the filing of reports from those not subject to the Interstate Commerce Act. This objection has merit in that section I of the proposed regulations could be interpreted as calling for reports from noncarrier parents and subsidiaries. Such was not intended. Our authority to require reports is contained in section 20(1), which states, in part:

> The Commission is hereby authorized to require annual, periodical, or special reports from carriers, lessors, and associations (as defined in this section), to prescribe the manner and form in which such reports shall be made, and to require from such carriers, lessors, and associations specific and full, true, and correct answers to all questions upon which the Commission may deem information to be necessary ***.

It is our intention that the only entity required to file a report be the respondent carrier, in conformity with section 20(1). To make this clear, we have amended section I to state specifically that the information is to be submitted by the respondent carrier and have defined "respondent" as meaning only the carriers described therein and companies considered to be carriers pursuant to an order entered under section 5(4) of the act.

It will be necessary, of course, for many respondent carriers to contact their parents and subsidiaries for the required information. We cannot conceive this factor as violating section 20(1), so long as the information requested is reasonable, as we believe this limited amount of information to be. Since respondent must report only on his own corporate "family," there is no question of the information not being available to someone in the organization or readily ascertainable. Furthermore, as will be discussed below, the 1940 amendments to several sections of the act make it apparent that Congress intended this Commission to have access to the same type of information for the parents and subsidiaries of carriers as for the carrier themselves, whether or not such parents or subsidiaries were carriers. Finally, we must not be hypnotized by corporate fictions and lose sight of the real fact that the significant decisions affecting a controlled carrier are made by the individual officers and directors of the controlling organization. This is their right and privilege, and, under general corporate law, their duty. With a clear congressional intention that this Commission be familiar with those who control carriers expressed repeatedly in the act (see below), we cannot believe that the courts would deny us the right to ask that those individuals who choose to control a regulated carrier furnish the carrier such limited information as their name, principal occupations, and affiliations with other business or financial organizations.

The appropriate starting point for an analysis of our statutory authority is at the beginning of the act, with the broad "declaration of policy" set forth in the "national transportation policy," added by Congress in 1940:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Services, and of the national defense. All of the provisions shall be administered and enforced with a view to carrying out the above declaration of policy.

At the same time that Congress was broadening the purposes of the act in the general terms quoted above, specific grants of authority and directives to the Commission were added. The most significant, for our purposes here, was the amendment to section 12(1), which we have italized below:

> Section 12(1). The Commission shall have authority, *in order to perform the duties and carry out the objects for which it was created,* to inquire into *and report on* the management of the business of all common carriers subject to the provisions of this part and *to inquire into and report on the management of the business of persons controlling, controlled by, or under common control with, such carriers, to the extent that the business of such persons is related to the management of the business of one or more such carriers,* and the Commission shall keep itself informed as to the manner and method in which the same are conducted. The Commission may obtain from such carriers *and persons such information as the Commission deems necessary to carry out the provisions of this part; and may transmit to Congress from time to time such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary.* * * *

Section 204(a)(7), which is analogous to section 12(1) and relates to motor carriers, was also amended in 1940 to expand "the duty of the Commission" to include the duty "to inquire into * * * the business of persons controlling, controlled by, or under common control with, motor carriers to the extent that the business of such persons is related to the management of the business of one or more motor carriers * * *."

The following sentence was added to section 20(5) in the 1940 amendments to the act:

> The Commission or any duly authorized special agent, accountant, or examiner thereof shall at all times have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents, of such carriers

> and lessors, and such accounts, books, records, memoranda, correspondence, and other documents, of any person controlling, controlled by, or under common control with any such carrier, as the Commission deems relevant to such person's relation to, or transactions with such carrier.

Finally, section 220(d) was amended in 1940 to extend the Commission's authority to inspect the books and records of motor carriers to include the books and records of "any person controlling, controlled by, or under common control with any such motor carrier."

With these series of amendments to the act, Congress could hardly have made it more clear that we have not only the authority, but the obligation, to concern ourselves with the activities of the persons controlling, controlled by, and sharing control with carriers. The amendments evidence a design to confer on us authority to gather information on these parties which is practically the same as our authority with respect to carriers.

In a case mentioned frequently in the responses, *Burlington Northern, Inc.* v. *Interstate Commerce Commission,* 462 F. 2d 280, *cert. denied,* 409 U.S. 891 (1972), the United States Court of Appeals for the District of Columbia described the congressional purpose for the amendment of section 20(5) quoted above:

> the motivation for amending the section in 1940 was to permit the Commission to inspect and copy accounts, records, and explanatory material of controlling, controlled or jointly controlling persons in a manner similar to the inspection afforded in the case of regulated carriers. [462 F. 2d 280, 287.]

Thus, we are given the broad authority to inquire into the "management of the business" of these persons who are related to carriers in the same manner as we are to inquire into the "management of the business" of the carriers. The sole limitation imposed is that the inquiry be "related to the management of the business of" the carrier (sections 12(1) and 204(a)(7)) and that the documents to be inspected be such "as the Commission deems relevant to such person's relation to or transactions with such carrier" (sections 20(5) and 220(d)).

If we relate the statutory directive to the information required by these sections of the proposed regulations, such information appears to us to come well within the parameters set by Congress. A minimal inquiry into the "management of the business" of an organization would include the naming of the organization and its principal officers and directors, a description of its business and certain limited financial information, such as a balance sheet and income statement. The occupations and affiliations of the principal officers and directors are properly called for by the regulations, since these individuals are, in most instances, controlling persons whose business is a proper subject of inquiry. Certainly, the financial condition and the management and control of the parents and subsidiaries of a carrier are "related to the management of the business of" the carrier. This is particularly true as to the business dealings between the carrier and officers and directors called for in the section entitled "Affiliations of Officers and Directors" as well as the interrelationships with the carrier to be described in "Corporate Structure."

The statutory provisions we are interpreting here must all be "administered and enforced with a view to carrying out" the national transportation policy set forth above. We believe this requirement of the act reinforces our conclusion that we may require the reporting of the information in these sections despite the fact that the information will often come from persons other than the carrier. We have set forth above the background for the drafting and dissemination of these regulations. The subcommittee's representatives have testified as to many practices which would contravene the letter and spirit of the national transportation policy, and which may be remedied through the gathering of the requested data. Under that policy, we must strive to "foster sound economic conditions in transportation" and "eliminate unfair and destructive competitive practices." These regulations are a major step towards those goals.

Our exposition of the statutory support for the action taken herein will end with a recent example. In the Railroad Revitalization and Regulatory Reform Act of 1976 (the 1976 Act), the Commission is directed to study conglomerates and other corporate organizations within the rail industry:

> Sec. 903. The Commission shall undertake a study of conglomerates and of such other corporate structures as are presently found within the rail transportation industry. The Commission shall determine what effects, if any, such diverse structures have on effective transportation, on intermodal competition, on revenue levels, and on such other aspects of national transportation as the Commission considers to be legitimate subjects of study. The Commission shall prepare a report with appropriate recommendations and shall submit its report to the Congress within 1 year after the date of enactment of this Act.

The congressional mandate to make such a broad study must be viewed as including the view of Congress that, under the statutes administered by this Commission, we are presently empowered to gather the necessary information.

Before discussing the objections to our authority based on the *Burlington Northern* case, we will briefly respond to those who concede that our power and duty to "inquire" pursuant to section 12(1) may be very broad, but contend that our authority to require the reporting of information is much more limited in scope.[2] We concede that there must be some limitations on our authority to require reports under section 12(1), which is expressed in the following sweeping language, "to require *** specific and full, true, and correct answers to all questions upon which the Commission may deem information to be necessary ***." Thus, the statute appears to give us unlimited discretion concerning the subject matter of reports.

We agree that there are limits to this discretion. We believe these limits have been well stated recently by the U.S. Supreme Court in *California Bankers Ass'n.* v. *Shultz*, 416 U.S. 21 (1974), which involved regulations requiring reports pursuant to the Bank Secrecy Act of 1970. The Court quoted from earlier Supreme Court decisions in formulating the constitutional limitations upon an administrative agency's power to require reporting of information. The reports are permissible when:

> *** the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. "The gist of the protection is in the requirement, expressed in terms, that the disclosure shall not be unreasonable." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652-653 (1950); see *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208 (1946). [416 U.S. 21, 67.]

We believe that we have demonstrated above that the information called for in these two sections is well within our broad authority to inquire; that the information required is limited in scope and clearly stated; and that the information is relevant to the responsibilities given to us by Congress. Accordingly, we have concluded that these reporting requirements meet the "reasonableness" test of the Supreme Court quoted above.

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[2] Several parties maintain that the last sentence of section 20(1), by referring to "an account of the affairs of the carrier," without mentioning affiliates, means no information on affiliates can be required. However, that sentence refers only to the "form and detail" of the report. Furthermore, the numerous 1940 amendments quoted above make it clear that many aspects of the business of those who control, are controlled by, or share control with, a carrier must be considered as part of the "affairs of the carrier."

The case most often cited by those questioning our authority in this area is *Burlington Northern, supra.* In that case, the courts refused to permit our agents to inspect a carrier's budget forecast data on the ground that such material did not constitute "accounts, books, records, memoranda, correspondence and other documents" within the meaning of section 20(5) of the act, and, therefore, the carrier was not subject to a fine for failing to comply with an investigative order calling for the forecasts. We should point out that the recording and reporting of forecast data was not then required by any Commission regulation.

Certain parties herein contend that *Burlington Northern* limits all our powers under section 20, not just the investigatory power under section 20(5), to the gathering of information which is related to, or explanatory of, required accounting and bookkeeping entries. We do not believe that this case can be interpreted so broadly. We will repeat here our view of the more sound interpretation of *Burlington Northern,* which appears in our report in Ex Parte No. 290, *Procedures Governing Rail General Increase Proc.*, 351 I.C.C. 544, served March 10, 1976, in which we required the submission by railroads of certain forecast data.

> We are convinced, however, that this limitation [of *Burlington Northern*] on our investigatory powers, which are ordinarily exercised through agents without issuance of formal orders by the Commission, and under which parties are subject to substantial forfeitures for refusing to allow inspection of material described in the statute, is not conclusive on our powers to require projection data. The case does not hold that the Commission is precluded from receiving forecasts under any circumstances; it applies solely to *inspection* of section 20(5) documentary materials by the Commission in the context of the forfeiture provisions of section 20(7). The Commission's power to require the filing of forecast data by regulation was not at issue. Since *Burlington Northern* applies only where the Commission attempts to inspect materials not required to be maintained by regulation, it imposes no limitations on the kind of accounting records the Commission may require to be maintained and submitted. [351 I.C.C. 544, 554-555.]

We note that *Burlington Northern* is even more easily distinguishable in the present case, in that we are not here concerned with any information relating to forecasts.

A decision of the District Court for the Northern District of Illinois, *C.A.B.* v. *United Air Lines, Inc.*, 399 F. Supp. 1324 (1975), which cited *Burlington Northern,* has also been cited in this proceeding as limiting our authority under section 20. The *C.A.B.* decision is consistent with *Burlington Northern* in that it limits the access of the C.A.B. to those "documents which were required to be kept or those documents kept which relate to the required records." 399 F. Supp. 1324, 1328. Again, however, the court was not presented with the question of an agency's power to require the recording or reporting of information. As the court stated:

> Not raised or decided here is the question of what records, or file system, Congress or C.A.B. might require, e.g., a carrier's parent's or subsidiary's activities, officers' positions on other boards of directors or employees' personal affairs.

Accordingly, we conclude that, while circumscribing our access to information not required to be recorded or submitted, *Burlington Northern* does not place any relevant limit on the information we may require carriers to report. As previously outlined, the limitations on our authority to require reports are: (1) relevance to our statutory purposes and obligations; and (2) the standard of "reasonableness," as enunciated in the *Bankers* case.

VOTING STOCK OWNERSHIP

While we believe the section entitled "Voting Stock Ownership" in the proposed regulations to be relevant to our statutory purposes, we have concluded that adoption of this section is inadvisable due to substantial questions as to its feasibility and usefulness. We will explain our doubts after summarizing the proposed requirements and giving some explanation of the problems raised.

The proposed sections asks the respondent carrier and any person controlling the carrier to identify by name, address, and type (bank, broker, individual, holding company, et cetera) the "30 largest holders of [their] voting shares" (excluding those holding less than one-tenth of 1 percent). "Nominee" accounts are to be aggregated and reported as one account. The holdings of each of the 30 largest holders must be broken down to show the number of shares over which the holder has sole, shared, or no voting power. As to those shares over which the holder has no voting power, the persons empowered to vote each of the 10 largest blocks of stock so held must be identified.

Some explanation of the problem at which this section is directed may be appropriate. Annual reports filed with this Commission by rail carriers must list the 30 shareholders with "the highest voting powers" in the carrier. Motor carriers must list the 10 highest. In the reports, certain names will appear, such as Cede & Co., Cudd & Co., Pacific Coast Stock Exchange Clearing Corp., and Midwest Stock Exchange Clearing Corp.

The entities ususally are not the beneficial owners of the securities reported in their names. They generally fall into three categories: (1) Brokerage firms will register stock owned beneficially by a customer in the name of the brokerage firm or a nominee, and the stock is generally spoken of as being registered in "street name." The principal reasons for this practice are that such registration facilitates trading by the customer and completion of the transaction by the broker-dealer. (2) The term "nominee name" generally reflects an arrangement used by insurance companies, investment companies and other institutional investors, and by financial agents, such as banks and trust companies, for the registration of securities held by them for their own account or for the account of customers. The nominee is often a partnership formed solely for the purpose of acting as the record holder of the security. Again, the nominee device allows the institution to more efficiently transfer a certificate to complete a sale. (3) Recently, nominee name arrangements have been used by clearing agencies and securities depositories who are able to settle transactions among their participants, such as broker-dealers, institutional investors or financial agents, by a book entry and without physical delivery of certificates.

While affording certain definite advantages to the owners of stock and those institutions dealing in securities, a major disadvantage is that our reports, in many instances, do not reflect the persons with the ultimate voting power in a carrier, but only give the street or nominee name. This is not to say that our reports do not disclose the company or companies which control a carrier. This information is called for in other sections of our current reports. (Section I of these regulations also requires that controlling persons be identified.) However, we are unaware of the identity of certain shareholders, who may be substantial holders. We wish to determine whether the proposed section is the appropriate vehicle to determine their identity.

The almost universal reaction of those commenting on this section is that carriers are *unable* to obtain the required information. The reasons for this are various. There is no obligation imposed on broker-dealers or banks to divulge the names of their customers to third parties, such as the carrier. It is contended that this would be a breach of the confidential relationship between the owner and the fiduciary which may exist by virtue of contract or custom. The carrier has no control over the banks or broker-dealers and cannot compel disclosure of their records. There are also certain specific secrecy laws governing foreign banks which may appear as nominees on the carrier's books.

Essentially the only positive testimony that the requested information on beneficial owners may be available was furnished by the staff director of the subcommittee. He did not dispute the futility of approaching the holders of record, but suggested consulting commercial compilations of insurance company and investment company portfolios, and the annual reports of equity securities filed by national banks. We see several difficulties with this approach. The usefulness of these reports to the carrier is limited due to the dates on which the underlying data is reported to the services by the institutions holding securities. The carrier is charged with the responsibility of making an accurate report at the end of the reporting year. Also, the reporting official cannot be sure that he is getting information from all the different vehicles through which a given investor holds stock. He would be presumably liable for the penalties flowing from a false report, although he has been forced to rely on secondary sources. In any event, these services do not lead to the individual person who may be unlawfully controlling two carriers.

Several parties have suggested that we wait for the SEC to act before adopting our own regulations. The parties hope to avoid the need for the preparation of differing, and perhaps contradictory, reports by those companies subject to the reporting requirements of both this Commission and the SEC.[3] They also raise the specter of a potential flight of investment capital from carriers subject to our regulation if we require more stringent disclosure than the SEC or other regulatory agencies. This subject was explored at the hearings, with little light shed upon the matter. This is understandable, since investment decisions are a subjective matter and the performance of the investment market impossible to predict. We believe we should move with some caution in this area, and be open to learning whatever we can on this most sensitive, and important, subject of the impact of our regulations on the market for carrier securities.

Fortunately, the SEC has recently completed its work on two relevant matters which are pending at the time of the hearings in this proceeding. The SEC was represented on the Interagency Steering Committee on Uniform Corporate Reporting described at the start of this report, and the SEC proposal published for comment on August 25, 1975, was patterned on the Model Corporation Disclosure Regulations, with certain significant differences. The SEC published only section II, relating to stockholdings, apparently considering the other disclosures to be already required by its regulations. Also, an important modification was made by the SEC in the stockholder disclosure item proposed by the Steering Committee. The published SEC proposal (item XA) required the reporting entity to disclose the absence of full voting power on the part of a recordholder only "if known," or, put differently, "if, to the issuer's knowledge," the recordholder does not have the power to direct the vote. See appendix E. The SEC was obviously trying to eliminate one aspect of this section which we find objectionable.

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[3] This would generally include those carriers (or their parent companies) with securities listed on a national securities exchange and those with $1 million in total assets and 500 shareholders. It should be noted that the 1976 Act extends the SEC prospectus requirements to railroads and requires both rail *and* motor carriers to conform to SEC disclosure standards in their reports to the SEC.

This substantial relaxation of the section's requirements did not prevent voluminous adverse comment. The SEC has published a volume entitled "Summary of Comments on Various Proposals Relating to Disclosure of Beneficial Owners and Holders of Record of Voting Securities." Release No. 34-11616; docket No. S7-580. According to this document, proposed item XA "received the most critical response of any of the proposals set forth in the release." P. 193. The 50-page summary of public comments on item XA is itself summarized in the following statement appearing on page 192:

> The overwhelming majority of commentators criticized proposed Item XA as unnecessarily costly and burdensome to reporting companies in view of their belief that the required lists would be neither legally nor logistically feasible and would not appear to serve any distinct, valid purpose under the Federal securities laws. Numerous commentators also predicted that the proposed disclosure would constitute an unwarranted invasion of privacy, facilitate takeover attempts—especially as to smaller companies, and that the resulting volume of information would physically overwhelm reporting documents and detract from more pertinent information.

The SEC's action following consideration of these comments is described in the following excerpt from SEC Release No. 34-13293; File No. S7-677, dated February 24, 1977:

> On August 25, 1975, the Commission proposed Item XA which would have required disclosure in proxy statements and certain other reporting forms and registration statements of the identification and holdings of each of the 30 largest record holders of each class of an issuer's voting securities. The proposed item also sought information about persons with the power to direct the voting of the ten largest blocks of stock held of record. This proposal was based on the Interagency Steering Committee's "Model Corporate Disclosure Regulations". The Commission has determined, on the basis of public commentary, to withdraw the proposal because the information to be elicited would not provide material information to investors; that

> the proposed disclosures would be unnecessarily burdensome, and in some instances, might involve an unwarranted invasion of privacy. The Commission also takes note of the strongly asserted views that the required lists would be neither legally nor logistically feasible. Moreover, it was repeatedly indicated that the information would not appear to serve any distinct, necessary disclosure purpose under the Federal securities laws, and could be utilized in takeover attempts to give the offeror an advantage not presently available and not intended by Congress to be made available through the enactment of the Williams Act.
>
> In consideration of the foregoing, the proposal published in the FEDERAL REGISTER (49 FR 42212) on August 25, 1975, and circulated as Securities Exchange Act Release No. 11616 entitled "Item XA" is hereby withdrawn.

Another quite relevant action of the SEC which has recently been completed is the study entitled "The Practice of Recording the Ownership of Securities in the Records of the Issuer in Other than the Name of the Beneficial Owner of such Securities," popularly known as the "Street Name Study." We believe the Street Name Study to be important herein since the record in our proceeding does not adequately explore the ramifications of the attempt in proposed section II to out-flank the longstanding methods of doing business in the financial community through the use of "street" and "nominee" names. The SEC has found substantial benefits in the use of these devices. As stated in the release announcing the Street Name Study:

> The benefits to the financial community of nominee and street name registration—the avoidance of multiple routine transfers, the significant economies of the book-entry depository, and the decrease in the level of fails (transactions which are not completed by settlement date) which occurs when clearing agencies are used to complete transactions—contribute to faster transaction processing and lower cost. Furthermore, the use of street or nominee arrangements facilitates the transfers of record ownership which do occur. Reviewing the last five years in the securities industry, it appears that the methods of clearance and settlement which have developed have substantially alleviated the "back office" problems endemic in the late 1960's and that it would be difficult for the securities industry to handle periods of heavy volume through present processing systems without the use of street or nominee names. [Exchange Act Release No. 11708, October 3, 1975.]

The SEC also cites "serious drawbacks" in the use of street and nominee accounts. The principal drawbacks are (1) the difficulty and expense to a company communicating with its voting shareholders; and (2) the obstacles raised to public disclosure of beneficial ownership. It is this latter problem with which we are directly concerned.

Despite these difficulties, the SEC concluded that the benefits of "street" and "nominee" practices warranted continuation of the present system. In its report to the Congress dated December 3, 1976, the SEC stated:

> The Commission has concluded that the practice of registering securities in the records of the issuer in other than the name of the beneficial owner of such securities is consistent with the purposes of the Act, with particular reference to Sections 12(g), 13, 14, 15(d), 16, and 17A. The practice benefits investors and the securities industry by facilitating the transfer of record ownership and the clearance and settlement of securities transactions. In addition, it is integral to the operation of securities depositories. At the same time, the widespread use of nominee and street name registration causes certain problems. The Commission has found, however, that established procedures have overcome many of these problems, and the Commission believes that the problems which remain can be mitgated within the framework of the current system.
>
> The Commission, therefore, recommends that no steps be taken which would discourage the use of nominee and street name registration or diminish the benefits which the practice provides.

We regard these two actions by the SEC as persuasive support for our decision to refrain from adopting the proposed section on "Voting Stock Ownership." The results of the "Street Name Study" indicate that the practice of registering stock in "street" or "nominee" will continue. Our adoption of this section might well be a step "which would discourage the use of nominee and street name registration," a result the SEC wishes to avoid. More importantly, the SEC's finding that even a substantially weaker version of this section is of little benefit and "unnecessarily burdensome" is entitled to great weight, considering the expertise of the SEC and its vital interest in full disclosure.

Finally, the SEC's decision to withdraw its item XA means that it is only those who invest in the common stock of carriers regulated by this Commission who must concern themselves with this disclosure. As indicated above, the effect of this burden on the market for carrier securities has been far from fully explored. We do not believe that the minimal benefits which might be derived from adoption of this section warrant the risk we may be imposing on carriers marketing their securities and on investors who may be holding the securities of carriers.

In reaching our decision to postpone the adoption of additional reporting requirements on voting stock ownership, we have considered the rather substantial disclosure material already available to us. The critical question in any exploration of stock ownership is, "Who actually controls this carrier?" We already require in our annual reports that company (ies) controlling a carrier be identified and that the basis of control be given. We are also requiring the identification of all controlling persons in section

I of the regulations adopted by this report and order. Therefore, the most important question may be answered.

In addition, our annual reports currently require the names of the 30 (railroad) or 10 (motor carrier) "security holders who * * * had the highest voting powers in the respondent." The name of the beneficial owner may not appear, of course, but we are at least on notice that a block has an unidentified owner. If we wish to pursue the ownership further on that particular carrier, we have available the reference services mentioned at the hearing. In addition, we have an important source of information on *beneficial* ownership available at the SEC with respect to all those carriers reporting to it. Under the Securities Exchange Act of 1934, section 13(d) requires that any person acquiring 5 percent of a class of equity securities file a statement with the SEC, subject to certain exemptions. In addition, section 16 of that act requires that officers, directors, and beneficial owners of 10 percent of a class of equity securities of a reporting company file statements with the SEC showing their current beneficial holdings and any change in their holdings of that security. It appears to us that these sources can be of great assistance in ascertaining the real voting power in, at least, the larger carriers, who have, after all, the greatest effect on the national transportation network.

DEBTHOLDINGS

The section entitled "Debtholdings" (section III of appendix C) contemplates the production of information by respondents relative to the outstanding debt which each has incurred. Both long- and short-term financial obligations and other major liabilities are included within the scope of this proposed section. As stated earlier, supporters of this section, most notably the subcommittee, allege that these financial obligations are potential levers of corporate control to which insufficient attention has been directed in the past by those charged with a regulatory function. The perceived need for these regulations is based upon a premise that a debtholder can effectively exert control on a regulated carrier's conduct through the inclusion of restrictions placed in the debt instrument regarding financial condition, disposition of assets, and management structure. Knowledge of a regulated company's outstanding debt, and the terms and conditions of the agreements, is viewed by the subcommittee representatives as the best way to prevent a very serious threat from creditor control or influence.

Those parties that oppose the implementation of this section do not perceive this peril or threat. In fact, their statements do not address that allegation and do not seem to recognize its existence. Instead, the common theme of the opposition is a belief that compliance would impose a heavy burden—expressed in terms of time and money; in short, they feel the proposal to be a nuisance and an expensive one. With minor exceptions, no resistence to the type of information concerned was expressed.

We agree with proponents that the possibility of a debtholder assuming some form of control does exist. However, the degree to which such control exists now, or might exist, is open to question. The financial situation that would precipitate such action would necessarily have to be severe. Absent major financial disaster, the probability of such action seems remote. Nevertheless, the possibility exists because funding by the issuance of debt certificates with restrictive covenants of various descriptions is a longstanding and accepted part of doing business. In fact, proper management almost requires it for the orderly and consistent growth necessary for success in the marketplace. Accordingly, there is merit to the subcommittee's arguments that closer scrutiny of a carrier's debtholdings would assist in a proper assessment of the degree of influence and/or control being exercised by creditors which could limit normal corporate activities. We believe that the possibility of such influence or control is sufficient to institute the reporting requirements contained in section III of the proposed regulations.

The information requested in section III will allow this Commission, other regulatory commissions, and the investing public to monitor properly the financial health of regulated companies and to intercede should a trend or situation become evident that would be detrimental to the continued financial health of the company. This approach does not assume that all creditors are poised to take control of a company at a moment's notice, but it does provide a degree of surveillance that has not received great priority in the past. As stated earlier, part of this Commission's obligation under the national transportation policy is " *** to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transporation and among the several carriers ***." To observe this mandate faithfully, we believe that the proposed regulations are necessary. That necessity, however, is not born of an unrealistic fear, but of a careful assessment of possible dangers to corporate financial health that warrant close observation.

Certainly, no serious argument can be offered to the effect that such information is not available. Carrier management would be seriously derelict in its duties were that the fact. Rather, it is the collection and presentation of that information that has elicited the opposition. Accordingly, the question to be determined is not the reasonableness of the specific information, but the reasonableness of the request for that information to be reported in the contemplated form. Basic to this determination is the question of whether this additional reporting requirement will create an undue burden, for we recognize that this section will entail an effort on the part of carrier management.

Compliance with this section, therefore, is a matter of compilation and not investigation. Subparagraphs A, B, and C would require a minimum effort to report because it is not unreasonable to assume that carrier management has actual knowledge of major long-term, short-term, and financing lease arrangements and equipment trusts issued to finance daily operations and long-term capital expenditure projects. It is only the last part of paragraph A which would require some computation to determine the holder(s) of more than 5 percent of any issue. Even then, the only information requested is the name, address, and type of holder. Certainly, the detail requested for this, and the other sections, is not onerous.

Smaller carriers would not be put to an undue exertion for it seems reasonable to assume that their financial undertakings would be commensurate with their relative size. Larger carriers with wider financial obligations are equipped with sufficient staff and technological aids to provide the information. The evidence submitted by those objecting did not, for the most part, indicate that compliance would be impossible—only an allocation of efforts that was not appealing.

On balance, we are of the opinion that the type and amount of information required to be reported by section III does not entail an undue burden upon respondents. This Commission's obligation under our governing statute requires that we be properly informed with respect to all aspects of a regulated carrier's financial operations and condition. Current reporting, including annual reports, is no longer sufficient to guarantee that we remain responsible and responsive to our congressional mandate. We are forced to conduct a balancing test to determine whether or not to impose these additional reporting requirements and we find that the evidence clearly shows that the benefit to be derived is greater than the burden to be imposed. We conclude that the request for the submission of the information contained in this section of the proposed regulations is a reasonable request, and one that will result in an ultimate benefit to the transportation industry.

GENERAL

Objections to the burden of additional reporting were not restricted to the "Debtholdings" section, but were frequently directed at the regulations as a whole. The general complaint can be summarized in the statement, "More paperwork!" We are quite sympathetic to this complaint, particularly since we have ourselves recently increased the requirements for carrier reporting under Ex Parte No. 275, *Expanded Definition of Term "Securities"*, 348 I.C.C. 288 (1975), and Ex Parte No. 290, *supra.* Nevertheless, as pointed out in the preceding paragraph, we have our statutory obligations to fulfill. This does not mean that we cannot accommodate our need for information with the economic needs of the transportation industry. It is generally true that smaller carriers are less able to bear the cost of additional reporting and that the type of information required here will have significance to the industry in direct proportion to the size of the entity reporting. Accordingly, we are imposing these reporting requirements on only those carriers having gross carrier operating revenues (including interstate and intrastate) of $20 million from carrier operations for their most recent accounting year.

Moreover, we will make every effort to insure that the information herein required may be used by the carrier in all other proceedings before the Commission in which it would be relevant or is required without the necessity for a change in format for purely procedural reasons.

There is a final matter of significance that requires discussion. Representatives of motor carriers of passengers and water carriers have requested exemption from the imposition of these reporting requirements. The motorbus owners specifically request exemption for any carrier having gross annual revenues of less than $10 million, and also ask for a determination that any larger motorbus carrier be deemed in compliance if it makes a report to another governmental regulatory agency wherein the information supplied is similar. The water carrier asks that family-held holding companies and other water carriers be specifically exempted.

The request for exemption of smaller carriers based upon gross annual operating revenues has already been granted by our determination above that *all* regulated carriers having less than $20 million annual gross carrier operating revenues will be exempt from these reporting regulations. We must, however, reject the other specific requests for exemption or risk negating all benefits to be derived from this proceeding. A primary objective of this proceeding is to secure comprehensive information concerning the entire surface transportation industry subject to our jurisdiction. To exèmpt any one mode, or class of carrier, would necessarily destroy the comprehensive nature and character of that information. The evidence put forth in support of the requests is not convincing that the exemptions would be in the best interests of this Commission, the general public, or the carriers themselves.

Numerous comments were received which requested clarification of the wording of the proposed regulations or suggested additional definitions. We found the comments quite helpful and have adopted several of them. These changes are listed in appendix F. All comments and contentions of the parties not expressly set forth or referred to were considered and were found to be without merit and not requiring further discussion.

An appropriate order will be entered.

COMMISSIONER GRESHAM, dissenting in part:

My differing position in this proceeding is prompted not so much by any major disagreement with requiring disclosure of the information selected here by the majority, but rather by the majority's gratuitous statements regarding its overly generous view of the extent of the Commission's inspection powers. Unlike the majority, I seriously doubt that section 903 of the Railroad Revitalization and Regulatory Reform Act of 1976 (seized upon by the majority apparently in self-reassurance) actually empowers the Commission to go beyond section 20(5) of the Interstate Commerce Act as construed by the *Burlington Northern* decision. The Congress was fully aware of the *Burlington Northern* limitations on our inquisitorial powers when it approved section 903, and yet it did not specifically provide for any broadening of that authority. Thus, the majority's view on this matter is anything but convincing.

Further, section 12(1) of the Interstate Commerce Act, which was also relied upon by the majority in Ex Parte No. 290 and which is really intested, cannot be interpreted as a general warrant to inquire into the affairs of all persons, no matter how tenuous their relationship with those properly within the Commission's jurisdiction. The majority would have us believe that the Commission's inspection authority somehow has been expanded, but it fails either to explain how this expansion has been effected or otherwise to justify its position. We are thus left to the very "improvisations" to which I objected in Ex Parte No. 290, *Procedures Governing Rail General Increase Proc.*, 351 I.C.C. 544, 580.

APPENDIX A

Respondents and participating parties

Adams, Walter
Alleghany Corporation
Allen, Julius W.
American Bankers Association
American Federation of Labor, with:
    Congress of Industrial Organizations
American Freightways Co., Inc.
American Trucking Associations
Americans for Democratic Action
Arkansas-Best Freight System, Inc.
Association of American Railroads
Association of Oil Pipe Lines
Atchison, Topeka and Santa Fe Railway Company
Aviation Consumer Action Project

B&L Motor Freight, Inc.
Bekins Company

C&H Transportation Co., Inc., and:
    Tyler Corporation
Campbell "66" Express, Inc.
Central Freight Lines, Inc.
Chessie System Railroads
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Civil Aeronautics Board
Cole's Express
Common Cause
Commonwealth of Pennsylvania
Consolidated Freightways
Continental Illinois National Bank and Trust Company of Chicago
Continental Trailways, Inc., and:
    TCO Industries
Corporate Accountability Research Group
Council on Economic Priorities
Corporate Data Exchange, Inc.

Distribution Systems, Inc., jointly with:
    Del Monte Corporation

Dohrn Transfer Company
Duncan, Virgil E.

Express Freight Lines, Inc.
Exxon Pipeline Company

Fairchild General Freight, Inc.
Farmland Industries, Inc.
Fertilizer Institute
Frontier Delivery, Inc.

Garrett Freightlines, Inc.
Georgia Highway Express, Inc.
Gifford-Hill & Company, Inc.
Grand Trunk Western Railroad Company
Greyhound Corporation
Gulf Refining Company

Hahn Truck Lines, Inc.
Hull, Richard M. and Leroy Hallman
Hydrocarbon Transportation, Inc.

IC Industries
Ideal Truck Lines, Inc.
IML Freight, Inc.
Inland Transportation Co., Inc.
Interfaith Center on Corporate Responsibility
International Mineral & Chemical Corporation

Jack Rabbit Express
Johnson Motor Lines, Inc.

Kenan Transport Company

Leaseway Transportation Corp.
Locker, Michael

Merchants, Inc., jointly with:
    Merchants Fast Motor Lines
Metcalf, Senator Lee
Midwest Towing Co., Inc.
Mobil Pipe Line Company
Motor Freight Express

National Association of Motor Bus Owners
National Council of Farmer Cooperatives
National Industrial Traffic League
North American Van Lines
North Dakota Farmers Union
North Dakota Public Service Commission

Nu-Car Carriers, Inc., jointly with:
  Neuendorf Transportation Co.,
  Pinto Trucking Service, Inc.

Pepsi Co., Inc.
Puget Sound Tug & Barge Company
Purolator Courier Corp.

Red Arrow Freight Lines
R.J. Reynolds Industries, Inc.
Richardson and Tyler
Rocky Mountain Motor Tariff Bureau, Inc.
Rocor International
Ruan Transport Corporation

Safford, Porter & Associates, P.C.
Schell, John T.
Sea-Land Service, Inc.
Severance, H.L.
Shell Oil Company
Shell Pipe Line Company
Shippers Imperial, Inc.
Soldofsky, Robert M.
Southern Hardwood Traffic Association
Subcommittee on Reports, Accounting, and Management,
  Committee on Government Operations of the United States Senate

Texas Gas Transmission Corporation
Texas Oklahoma Express, Inc.
Texas Pipe Line Company

Weicker Moving & Storage Company
West Coast Truck Lines, Inc.
Western Pacific Railroad Company
Willis Shaw Frozen Express
Wilson Freight Company

Yellow Freight System, Inc.

APPENDIX B

Summary of representative comments and proposals of the parties

Sea-Land Service (Sea-Land).—Sea-Land is a certificated water carrier regulated under part III of the act. It opposes the proposed regulations by arguing that such regulations would force it to establish substantial information-gathering procedures with no guarantee that all of the required information could be collected.

It is stated that much of the information required by the proposed regulations is not available and would have to be obtained from third parties. The present system used by its parent for reporting to the SEC is alleged to provide adequate disclosure on the relationships between the company, its parent, stockholders, officers, affiliates, and lenders. Such information for this Commission is viewed as unnecessary and immaterial and violative of the confidentiality of bank-client relationships.

Recor International (Rocor).—Rocor is a noncarrier holding company subject to the jurisdiction of the Commission with respect to accounting records, filing of reports and other items. It is argued that in a situation where both a parent and a subsidiary file reports with the Commission, the proposed regulations should be made applicable only to one of those companies.

In addition, Rocor would have similar filings as those under consideration made with another governmental agency, made applicable to satisfy the Commission's purposes. It is the burden of the increased reporting that troubles this respondent, and it suggests that present required reporting should be refined to produce the necessary information thus rendering the proposed regulations moot.

Purolator Courier Corp. (PCC).—While PCC does not object to the Commission requiring the furnishing of information as set forth in the proposed regulations, it does submit that much of that information has already been supplied by carriers in the same position as it in connection with previous applications for approval of acquisitions or transfer of authority.

Potential problem areas in the proposed regulations are identified by PCC as basically a lack of precise definitions which would enable possible respondents to understand the degree to which compliance is necessary. The definition of "control" is an example. In addition, it is argued that it may be impossible for widely held companies such as PCC to obtain the necessary information regarding the ownership of voting stock in view of present law and practice. Generally, it is the position of PCC that the proposed regulations as they now appear are too vague and imprecise to be helpful to the Commission or the carriers; and the retention of this format will result in an undue burden upon carriers in both time and money.

Puget Sound Tug & Barge Company (Puget).—This carrier maintains that the Commission is without the power to compel the submission of data contemplated by the proposed regulations. If the parent is a noncarrier, it is argued, then the Commission is without jurisdiction to compel disclosure of the 30 largest stockholders of that parent or of any other information relative to that parent. Instead, it is argued that the Commission should direct its energies towards the cure of known abuses practiced by regulated carriers.

The proposed regulations are also attacked as too broad and tending to foster or represent harassment of segments of society that are blameless. That is, the proposed rules should be restricted to apply to companies whose stock is held in substantial blocks by institutional investors and/or in street names, and the rest of the industry should not be subject to that strict disclosure. Family-held companies, as Puget avers that it is, should be exempted in the view of this company.

PepsiCo, Inc. (PepsiCo).—PepsiCo argues that the proposed regulations are not consistent with their stated purpose because they look to the carrier for information that should properly be submitted by the directors and nominees. In addition, PepsiCo views the submission of the proposed data to be superfluous and inflationary in light of the enormous and wide-ranging amount of information that must be supplied. Much of this information, it is argued, could not be collected from institutional investors without specific jurisdicition—and that the Securities and Exchange Commission is the only proper governmental body which could compel such disclosure.

Proposed revisions are submitted which would allegedly improve the efficiency of the proposed regulations. More specific and precise defintions of terms and some degree of uniformity with present or proposed SEC regulations are suggested as the means to accomplish workable regulations regarding corporate disclosures.

Nu-Car Carriers, Inc. (Nu-Car).—Nu-Car opposes the proposed regulations on the grounds that the regulations are truly concerned only with the activities of a small part of the transportation industry and that the imposition of the proposed requirements upon all class I carriers would be an unwarranted burden. In addition, Nu-Car alleges that the proposed regulations far exceed the type and amount of information that the Commission is empowered by Congress to obtain under section 204 of the act or other sections. It is argued that, even if authority rested with the Commission, the information sought is not always available to a carrier. The inability to force a nominee to reveal the actual owner of stock held in a fiduciary capacity is submitted as an example of the difficulties to be faced if compliance were attempted.

National Industrial Traffic League (the League).—The League supports the Commission's proposed regulations and cites the precarious financial position of several American railroads as an example of the need to more effectively monitor and regulate the transportation industry. The areas of corporate structure, stock ownership, interlocking corporate relationships, and debtholdings that are the core of the proposed regulations are deemed essential for an effective regulatory posture.

However, the League suggests that the proposed regulations remain within the bounds of that information which is reasonably necessary in order to attain the goal of effective regulation. While no specific suggestions are made in this respect, it is the League's position that the Commission has the necessary legal authority to demand relevant information to keep itself abreast of current trends in the transportation industry.

Western Pacific Railroad Company (WPRR).—WPRR opposes the proposed disclosure requirements and cites as an example its own parent company, Western Pacific Industries, Inc. It is the position of WPRR that sufficient information is supplied by the parent to the Securities and Exchange Commission, allegedly all public information and that the further requirements proposed in this proceeding are not relevant.

Moreover, the proposed regulations are viewed by WPRR as duplicative of other filings, time consuming, and very expensive. Specific sections of the proposed regulations are attacked and found wanting in light of present requirements of other agencies, most notably the Securities and Exchange Commission.

Merchants, Inc. (Merchants).—Merchants is a carrier holding company with several carrier subsidiaries. This party states that it is in general agreement with the aims of the proposed regulations, but cautions the Commission that the present form may duplicate current and proposed reporting requirements of the Securities and Exchange Commission to such an extent as to constitute an undue burden upon the carrier. Merchants is also concerned that the debtholding requirements may adversely affect the availability of corporate working capital, and rejects the implication that debt restrictions automatically place creditors in a managerial or policymaking position.

International Minerals & Chemical Corporation (IMC).—IMC is a large shipper of fertilizer and materials, and supports the proposed reporting requirements. In the view of this shipper, many conglomerate parents of railroads have affected the railroad's ratemaking and pricing policies to an extent not encountered heretofore. This has, in IMC's view, made it nearly impossible to analyze rail financial reports accurately. IMC states that "to the end that carrier corporate financial data may become more accessible, IMC supports the Commission***."

Greyhound Corporation (Greyhound).—Greyhound supports the proposed regulations insofar as they would tend to promote reasonable uniformity in Government reporting requirements. In accordance with that end, Greyhound suggests that a final order not be issued until all agencies involved in the Interagency Steering Committee have considered their own proposals and a reasonably uniform procedure has been adopted.

Speaking specifically to the proposed regulations in this proceeding, Greyhound alleges that sufficient need for such requirements as a balance sheet and income statement of each nontransportation subsidiary has not been established. Questions relating to the divulgence of voting stock ownership are raised, and Greyhound objects to the proposed regulations insofar as they would seem to require the furnishing of information that is not readily available in the ordinary course of business.

The theme of the suggestions and criticisms advanced by Greyhound revolves around a perceived need for uniformity between and amoung various government agencies which are charged with a regulatory function.

Garrett Freightlines (Garrett).—Garrett submits that the proposed regulations are too vague and subject to too many interpretations which could lead to unjust application of the requirements. The result of the alleged vagueness in terms, it is argued, could result in an undue burden upon carriers. Examples are set forth to substantiate its claim which include the definition of the term "control" and ambiguity surrounding the issue of voting power of stocks. It is concluded that the proposed rules, as they now appear, should be rewritten and resubmitted to the industry for comment.

The Fertilizer Institute (Institute).—This trade association takes particular interest in that portion of the proposed regulations which deals with disclosure of railroads' interlocking corporate relationships. The Institute does not support across-the-broad reporting of all types of carriers regulated by the Commission. Instead, the Commission is urged to review and evaluate the need for additional data for each type of carrier.

The Institute does submit that such reporting is necessary for rail carriers, but suggests some changes in the proposed regulations. For example, it is urged that the carriers, not the Commission, bear the burden of identifying and reporting those transactions which give the appearance of serving to divert rail earnings to holding companies or other affiliates. It is also urged that the definition of "control" not be limited to the control that may be exercised by a single rail carrier. Generally, though, the Institute supports the Commission's attempt to require full disclosure.

Farmland Industries (Farmland).—Farmland is a regional farm cooperative. It supports the Commission's proposed regulations for the stated purpose of determining where railroad earnings are being diverted other than for strictly railroad business. Although the bulk of this submission is directed towards a greater need for information regarding the railroads, the proposed regulations are also deemed necessary for all carriers subject to our jurisdiction.

National Association of Motor Bus Owners (NAMBO).—NAMBO opposes the promulgation of the proposed regulations upon several grounds, beginning with a lack of public need for the type of evidence sought. It is their opinion that the Commission lacks jurisdiction to promulgate these rules especially with respect to parent corporations and subsidiaries of motor common carriers.

This organization objects also on the grounds that it is not equitable for this Commission to adopt corporate disclosure regulations applicable to transportation enterprises and their noncarrier parents, affiliates, and subsidiaries prior to the adoption of similar regulations by other regulatory agencies. Such action could conceivably place a reporting carrier at a competitive disadvantage, it is argued, in attracting capital because potential investors would shun investments in companies subject to so much public scrutiny.

Accordingly, NAMBO requests that motor carriers of passengers with gross annual revenues of $10 million or less be exempted from any subsequent reporting requirements, and those with revenues greater than that proposed figure be deemed in compliance with Interstate Commerce Commission requirements if a similar report is made to one of several other specified governmental regulatory agencies.

Finally, NAMBO requests substantial revision and clarification of the proposed regulations, including clearer and more definitive definitions of terms if it is determined that the Commission does, in fact, have the authority to promulgate the contemplated rules and regulations.

Midwest Towing Co., Inc. (Midwest).—Midwest, a water common carrier, opposes the proposed regulations on the grounds that they are too broad and would subject water carriers to excessive reporting requirements under rules that are an overreaction to abuses that have developed in other modes. Accordingly, it is requested that water carriers be exempted from such reporting requirements when and if they become effective.

Speaking to the proposed regulations, Midwest asserts that the Commission is without the requisite statutory authority to enforce them. Generally, the Commission's intent to require information from noncarrier enterprises is the center of this argument.

Midwest suggests, in conclusion, that the Commission attempt to find some alternative means of securing the type of information contemplated that will not offend perceived principles of business and personal privacy and confidentiality.

American Bankers Association (ABA).—The ABA requests that the Commission delay the implementation of its proposed stock ownership disclosure requirements pending the outcome of proposed congressional legislation. In the event, however, that the Commission decides to implement the regulations, the ABA requests that the section requiring the disclosure of the persons voting the 10 largest blocks of stock be deleted. It is argued that such information, supplied by some banks acting as trustee, would be contrary to local law and would serve no useful purpose.

The proposed regulation that would require the disclosure of the 30 largest stockholders is attacked on both legal and practical grounds. It is submitted that in many, if not most, States a trustee is under a legal duty not to disclose the beneficial owners of a trust or any other of its particulars except in response to legal process. Thus, it is argued, banks would be unable to respond to a request from a carrier for such information.

The above comments refer primarily to the role of banks in the proposed regulations, but it is the position of the ABA that the large role that banks play in financial and fiduciary relationships with clients would present a conflict between confidentiality and privacy on the one hand, and the proposed reporting requirements on the other. In addition, the ABA also states that the role trust departments play in respect to control is little. Accordingly, the proposed regulations are not deemed necessary or useful in the present form.

Alleghany Corporation.—Alleghany objects to the proposed regulations on the general grounds that the imposition of the reporting requirements require unperformable duties to provide unneeded information. It accuses the Commission of treating the proposed disclosure regulations as an end, rather than a means to more efficient regulation.

Specifically, the section respecting corporate disclosure is opposed because it seemingly imposes a duty upon a corporate respondent which lacks the necessary information and which is not able to obtain that information without voluntary assistance of stockholders and directors. In addition, the information which would be supplied, assuming cooperation, is viewed as a violation of privacy and confidentiality with no commensurate increase in helpful knowledge.

The proposed requirements respecting voting stock ownership are viewed as making demands that are impossible to comply with and unnecessary. It is argued that this particular section of the proposed regulations would penalize a respondent for its *inability* to comply, rather than for its *failure* to do so. Examples are cited where past attempts by Alleghany to elicit stock ownership information have met with resistance and failure.

Finally, the definition of "control" as proposed by the regulations is objected to on the grounds that it is unnecessarily vague and general and would require respondents to guess as to the meaning in order to comply. Alleghany suggests that the Commission adopt a more carefully worded definition that would narrow the precise information sought.

Consolidated Freightways (CF).—CF states that it agrees with the philosophy of improved corporate disclosure, but feels that the proposed regulations lack clear definition of terms and that some of the reporting requirements contemplated place an undue and impossible burden on the carriers. For example, exception is taken to the proposed submission of financial statements from nonregulated subsidiaries and to the reporting of voting stock ownership. The section pertaining to disclosure of affiliations of officers and directors is attacked as too vague with an unreasonable amount of detail being required. CF concludes with a request that the subsequent requirements to be issued be in accord with current Securities and Exchange Commission requirements to avoid excess cost and time.

Chessie System Railroads.—The Chessie System adopts in general the statement submitted by the Association of American Railroads, but submits additional comments with respect to the proposals concerning voting stock ownership disclosure. It is the position of the Chessie System that the Commission is without the power to require the furnishing of such information from noncarriers not subject to Commission regulation. An argument is made that section 20 of the Interstate Commerce Act does not grant the requisite authority to require a list of the beneficial owners of stock even if such a list did exist in the carrier's files. Neither is section 12(1) seen as sufficient to empower the Commission to require the disclosure that is contemplated.

The Atchison, Topeke and Santa Fe Railway Company (Santa Fe).—The Santa Fe opposes the promulgation of these regulations primarily upon the grounds that the Commission is without the requisite power to compel the type of information sought. It is argued that section 20(1) of the Interstate Commerce Act does not authorize the Commission to compel a noncarrier parent company to produce the information requested about that parent.

In addition, it is charged that the proposed regulations will result in the compiling of unmeaningful information and place a great burden upon the railway through duplication of reports and conflicting standards for reporting similar information among other Government agencies. The Santa Fe also condemns the lack of a standard of materiality or finding of necessity to insure the information sought is meaningful. As an example, the proposed requirement seeking information of all contracts with officers and directors more than $600 is cited.

Association of Oil Pipe Lines.—This association opposes the proposed regulations on several grounds, among them the jurisdiction of the Commission to impose such requirements and the lack of precise definitions. It is requested, for example, that section II D of the proposed regulations, relating to information concerning the 30 largest shareholders of a parent, be deleted on the grounds that such information should not or cannot be released by the parent or another company in a fiduciary or confidential posture.

The Association of American Railroads (AAR).—The AAR states that it is opposed to the institution of these proposed regulations because they are patterned after the model regulations recommended by the Interagency Steering Committee on Uniform Corporate Reporting. As a product of a committee, it argues, the proposed regulations do not observe the jurisdictional limits of the Commission nor do they reflect any practical consideration of the information which is available to respondents. In addition, the proposed regulations are viewed as calling for information which would unduly burden the respondents to prepare and file and would not enhance the ability of the Commission to fulfill its regulatory responsibilities.

American Trucking Associations, Inc. (ATA).—The ATA opposes the proposed regulations as presently written on the grounds that they are unduly broad and burdensome and seriously deficient as a vehicle by which to attain the indicated objectives.

Specifically, objection is taken to nearly every proposed regulation. The regulations are viewed as unduly broad in terms of need, allegedly placing a heavy reporting burden on all class I motor carriers to uncover the possible, but highly unlikely, hidden ownership or control of a few carriers. The information sought concerning the 30 largest shareholders is viewed as too large a number, and it is suggested that the Commission substitute that only the 20 largest stockholders be named and exclude holders of less than 5 percent.

Regarding section IV of the proposed regulations relative to debtholdings, it is suggested by the ATA that Ex Parte No. 275, and not the instant proceeding, is the proper vehicle for fully defining "securities." In addition, part II of the proposed regulations is attacked for allegedly requiring information that is beyond the capability of the carrier to provide and of the Commission to compel. Enforcement of this proposed requirement, it is argued, is not addressed in the proposed regulations and may not be possible.

The better alternative, it is concluded, is to have rules of this type promulgated and made effective on the same date by all agencies which are pledged to their adoption, particularly the Securities and Exchange Commission. In the absence of such action, the ATA objects to the imposition of these rules as proposed at this time.

Exxon Pipeline Company (Exxon).—Exxon objects to those parts of the proposed regulations which would require carriers by pipeline to obtain information from their shareholders which is confidential. The entire section dealing with voting stock ownership is deemed impossible to comply with, as is the section concerning debtholdings.

Distribution Systems, Inc., and Del Monte Corporation (DSI and Del Monte).—DSI is a California corporation which owns various motor carriers and is itself treated as a carrier for certain purposes under applicable Commission orders. Del Monte is the parent company of DSI and is in the food processing business and not a carrier. Del Monte alleges that its carrier subsidiaries account for a much smaller portion of revenue than other aspects, and states that the proposed regulations would be burdensome to comply with in general, and impossible in certain specified cases.

For example, the task of sorting through the full shareholder lists to determine and aggregate all nominee accounts either for purposes of determining initially who are the largest 30 shareholders or to report precise percentages of total outstanding capital stock is deemed "ghastly and infeasible." The determination of actual beneficial ownership of shares held by nominees, brokers, and banks is considered impossible by Del Monte since such information is allegedly not normally available even for its own purposes.

Addressing section III on affiliations of officers and directors, it is argued that the regulations do not adequately define "affiliation." Instead, the definition is viewed as so vague as to be meaningless. In addition, the dollar amounts in subsections C and D are considered unrealistically small.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company.—It is the position of this rail carrier that the Commission is without the power to compel the submission of data relating to the corporate structure, voting stock ownership, or affiliations of officers and directors of the parent, Chicago Milwaukee Corporation. Furthermore, the determination of the details of stock ownership in the parent is deemed futile, and an unreasonable burden with no useful purpose.

Continental Trailways, Inc. and TCO Industries, Inc.—These parties initially request that whatever form of regulations may be adopted by the Commission be deferred until similar regulations by other agencies become effective. It is argued that the failure to do this would place an unfair burden upon those carriers subject to Commission regulation and particularly upon their parents and affiliates vis-a-vis other corporations without carrier affiliations. Addressing the proposed regulations, it is argued that certain portions require clarification or revision. Beginning with the definitions that are proposed, it is submitted that the terms "respondent" and "control" are not clear, among others. It is also argued that part I, regarding annual reporting requirements, requires extensive revamping in order for carriers to understand exactly what information is sought.

It is also argued that parts of section II, voting stock ownership, seem unduly burdensome since a carrier may not know of all voting arrangements which may be beyond the carrier's power to obtain. Section III concerning affiliations of officers and directors could, in this participant's view, result in an invasion of the privacy of countless individuals. Section IV on debtholdings is similarly attacked as burdensome to comply with and the suggestion is made that a carrier be able to submit the document itself which is evidence of a debt for the purpose of allowing the Commission to make a determination.

APPENDIX C

No. 36141

Corporate Disclosure Regulations

DEFINITIONS

Annual reporting. The term "annual reporting" means as of December 31 of each calendar year, or accounting year of thirteen 4-week periods (as defined in sections 1240.4, 1240.5, and 1249.3 of Title 49 CFR).

Control. The term "control" (including the terms "controlling", "controlled by", and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management or policies of a person, natural or artificial. Sources of power may include, but are not limited to: equity security ownership; debtholdings; sole or partial voting arrangements; common directors, officers, or stockholders; or lease, purchase, lines of credit, supply, distribution, or operating agreements.

Financing lease. The term "financing lease" shall refer to any lease which during the noncancelable lease period, either (1) covers 75 percent or more of the economic life of the property or (2) has terms which assure the lessor of a full recovery of the fair market value (which would normally be represented by his investment) of the property at the inception of the lease plus a reasonable return on the use of the assets invested subject only to limited risk in the realization of the residual interest in the property and the credit risks generally associated with secured loans.

Parent of respondent. "Parent of respondent" shall refer to every firm, holding company or other person or combination of persons who ultimately control the respondent, as well as any intermediary controlling entity.

Respondent. "Respondent" shall refer to all carriers required to file corporate ownership disclosure: Class I Railroads; Electric Railways; Express Companies; Pipeline Companies; Refrigerator Car Lines; Class I Carriers of Property; Motor Carrier Holding Companies; Class I Carriers of Passengers; Class A Inland and Coastal Waterways; Maritime Carriers; Class A Freight Forwarders; and all companies considered to be carriers pursuant to an order entered under section 5(3) of the Interstate Commerce Act; except that those carriers having gross carrier operating revenues (including interstate and intrastate) of less than $20 million from carrier operations for their most recent accounting year shall not be considered "respondents".

Joint venture. The term "joint venture" refers to a company owned and operated by a small group of businesses as a separate and specific business or project for the mutual benefit of the members of the group.

ANNUAL REPORTING REQUIREMENTS

I. Corporate Structure.

A. For each respondent, parent of respondent, subsidiary, or organization controlled by the respondent, joint venture involved in by the respondent, and subsidiary of an organization controlled by joint ventures involved in by the respondent, the following information shall be submitted by respondent:

1. Name and address.

2. Basis of control.

Indicate the method by which control is exercised. Examples may include, but are not limited to: equity security ownership; debtholdings; sole or partial voting arrangements; common directors, officers, or stockholders; or lease, purchase, lines of credit, supply, distribution, or operating agreements.

3. Principal business activities.

List and describe by four-digit SIC code and short title each industry in which the organization's activities generated 10 percent of its gross revenues or $5 million (during the reporting year). Four-digit industry SIC codes and short titles are listed in the most recent "Standard Industrial Classification Manual" as published by the Executive Office of the President, Office of Management and Budget. Four-digit SIC codes and short titles should be listed in order of significance relative to the total activities of respondent, based upon the percentage of gross revenues generated within each four-digit industry.

4. Copy of the latest balance sheet and income statement and consolidated balance sheet and income statement, if available.

B. Each respondent shall file a copy of any chart or other graphic material showing the relationship of the respondent to its parents, subsidiaries, and other organizations referred to in subparagraph A.

C. In addition to subparagraph A above, list every corporation, partnership, or other business organization in which the respondent owns more than 5 percent of the outstanding voting securities or other ownership interests and indicate the percentage so owned.

II. Affiliations of Officers and Directors.

A. The name and address of each of the company's principal officers and each director, trustee, partner or person exercising similar functions, of the respondent and parent together with his title and position with the respondent and with any parent, holding company, person, or combination of persons, controlling the respondent, and with any subsidiary of the respondent and any other company, firm, or organization which the respondent controls.

B. For each of the officials named under subparagraph A above, list his principal occupation or business affiliation if other than listed in subparagraph A, and all affiliations with any other business or financial organizations, firm or partnership. For purposes of this part, the official will be considered to have an affiliation with any business or financial orgranization, firm or partnership in which he is an officer, director, trustee, partner, or a person exercising similar functions.

C. A list of each contract, agreement, or other business transaction exceeding an aggregate amount of $50,000, in any 1 year, entered into between the respondent and any business or financial organizations, firm or partnership named in subparagraph B above, identifying the parties, amounts, dates and product or service involved.

D. A list of each contract, agreement or other business arrangement in excess of $600 entered into during the reporting period (other than compensation related to position with respondents) between the respondent and each officer and director listed in subparagraph A, identifying the parties, amounts, dates and product or service involved. In addition, provide the same information with respect to professional services for each firm, partnership, or organization with which the officer or director is affiliated.

III. Debtholdings.

A. A description of each long-term debt (debt due after 1 year) of the respondent, including the name and address of the creditor, the character of the debt, the nature of the security, if any, the date of origin, the date of maturity, the total amount of the debt, the rate of interest, the total amount of interest to be paid, and a copy of any and all restrictive covenants attached to the indebtedness. (Where such indebtedness is widely held, such as bonds and debentures, provide the nature of the trustee in place of the creditor.) With respect to each holder of more than 5 percent of each issue reported, provide the name, address, and type of holder—bank, broker, holding company, individual, or other specified category and amount of debt held.

B. A description of each short-term debt of the respondent (under 1 year) outstanding at yearend, excluding accounts payable, including the name and address of the creditor, nature and character of the liability, period of the debt, rate of interest, total amount of such short-term debt, nature of the security and a copy of any and all restrictive covenants attached to the indebtedness. (Where such indebtedness is widely held, provide the name of the trustee in place of the creditor.)

C. A description of each financing lease arrangement, equipment trust, conditional sales contract, and other major liabilities with respect to the capital assets of the respondent and involving aggregate payments in excess of one million dollars and a copy of any and all restrictive convenants attached to the indebtedness.

APPENDIX D

Proposed section which was not adopted

II. Voting Stock Ownership.

A. In descending order, the 30 largest registered stockholders of record of voting shares (not to include any holder with less than one-tenth of 1 percent of the outstanding shares) in the respondent, identified as to:

1. Name and address.
2. Type (bank, broker, holding company, individual or other specified category).
3. The number of voting shares held (as of the end of the reporting period) and its percentage relationship to total outstanding shares. (If some shares—such as preferred issues—carry limited voting rights describe the limitation and the number of shares affected.)

(In determining the number of shares held, all nominee and other accounts of each shareholder, including accounts held by depository trust companies, such as CEDE & Co., SICOVAM, Pacific Coast Stock Exchange Clearing Corp., Midwest Stock Exchange Clearing Corp., shall be aggregated and reported as one account in the name of the bank, broker, holding company, individual, or other identified shareholder.)

B. With respect to each of the 30 largest holders, the number of shares (and percentage relationship to total outstanding voting shares) over which the holder has

1. Sole voting power.
2. Shared voting power (if voting power is shared with any of the 30 largest shareholders, identify the shareholder and the number of shares held).
3. No voting power under any circumstances.

C. With respect to shares over which the stockholder has no voting power, the name and address of the person(s) empowered to vote the 10 largest blocks of stock, the number of shares and the percentage of stock in relation to the total outstanding voting shares.

D. With respect to the 30 largest holders of voting shares in any parent, holding company or other organization or person controlling the respondent, provide the information required in subparagraphs A, B, and C above. If the organization or person controlling the respondent also files this information, the respondent may incorporate this information by reference.

APPENDIX E

Proposal of Securities and Exchange Commission
published for comment in release No. 33-5609

ITEM XA. HOLDINGS OF 30 LARGEST SECURITY HOLDERS OF RECORD

1. Furnish the following information, in substantially the form indicated, with respect to each of the 30 largest holders of record, as of a recent date, of each class of voting securities of the registrant, provided, however, that no information need be furnished as to any record holder of less than one-tenth of 1 percent of the class. If known, show the column (5) the amount over which the holder of record has or shares the power to direct the voting of the securities held.

(1) Title of class	(2) Identity and address of holder of record	(3) Amount held of record	(4) Percent of class	(5) Amount over which holder of record has sole or shared power to direct the vote

2. If, to the issuer's knowledge, a record holder named in response to paragraph (1) does not have the power to direct the vote of the securities held, furnish if known, the information called for by paragraph (1) about the persons having the power to direct the vote of the 10 largest blocks of such securities held of record by such record holder.

3. If the issuer has a parent corporation, the issuer should furnish the information required by paragraphs (1) and (2) of this item with respect to such parent corporation.

APPENDIX F

Revisions[1] *to*
notice of proposed rulemaking and order

No. 36141

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[1] Revisions are keyed to paragraph names and numbers used in the April 1, 1975, proposed regulations.

CORPORATE DISCLOSURE REGULATIONS

Definitions: The following definitions were added to clarify terms many respondents found to be ambiguous:

"Respondent"
"Joint venture"

I. Corporate Structure.

A. To clarify the ambiguous use of "(and/or organizations controlled) of the respondent" in this paragraph, the phrase was revised to read "organization controlled by the respondent".

2. "Basis of control" was clarified.

3a. "Principal business activities". The use of "Respondents" in line three of this paragraph was incorrect. The term was replaced with "organizations". "Its" was added between "of" and "gross revenues". Subparagraph b was incorporated into subparagraph a.

5. This paragraph was changed from (number 5) to (paragraph B) thus making it refer only to the respondent and precluding duplicative reporting.

B. A final sentence was added to clarify when an officer should be considered affiliated with any business or financial organization, firm, or partnership.

C. In line 2, "business arrangement" was revised to read "business transaction".

In line 3, "aggregate value of $50,000 was revised to read "aggregate value of $50,000, in any 1 year". This establishes a time frame within which to compute the aggregate value.

III. Affiliations of Officers and Directors

A. Due to the provisions of the Privacy Act of 1974, Public Law 93-579, 5 U.S.C. 552a note, which became effective on September 27, 1975, the requirement that social security numbers be reported has been deleted.

IV. Debtholdings.

A. Subparagraph 1 was incorporated into paragraph A.

B. In line 2 "of the respondent" was moved to line 1 after "each short-term debt", and "outstanding at yearend" was added.

In line 7, "and date when debt was paid, or date when such debt must be paid" was deleted.

Added to the last line was "(Where such indebtedness is widely held, provide the name of the trustee in place of the creditor.)"

C. In line 3, "or major liability" was revised to read "and other major liabilities," to held clarify the meaning and intent of the requirement.

AB-19 (SUB-NO. 3)

BALTIMORE AND OHIO RAILROAD COMPANY ABANDONMENT, LANDENBURG BRANCH, NEW CASTLE COUNTY, DELAWARE

Decided May 26, 1977

Application of The Baltimore and Ohio Railroad Company for abandonment of a portion of the line known as the Landenburg Branch, in New Castle County, Del., denied.

Rene' J. Gunning and *Peter J. Shudtz* for applicants.

Henry M. Wick, Jr., Stanley E. Levine, and *Mark A. McNulty* for protestants.

Robert P. Kane and *Gordon P. MacDougall* for petitioner.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS BROWN, MACFARLAND, AND CLAPP

BY DIVISION 3:

Exceptions to the initial decision of the Administrative Law Judge were filed by applicant, The Baltimore and Ohio Railroad Company (B&O), and a reply to the exceptions was submitted by the NVF Company (NVF), a protestant in this proceeding. The Commonwealth of Pennsylvania (petitioner) filed a petition for leave to intervene and reply to applicant's exceptions, and the State of Delaware Department of Transportation (Delaware), a protestant, has filed a brief, treated here as a reply to applicant's exceptions. The B&O replied to the petition and moved to strike a portion of the NVF reply, and also replied to petitioner's reply and to that portion of the NVF reply sought to be stricken. NVF replied to applicant's motion to strike. While we agree with the ultimate conclusions of the Administrative Law Judge, we believe that additional discussion is required.

By application filed April 13, 1972, the B&O seeks a certificate of public convenience and necessity under sections 1(18-20) of the Interstate Commerce Act permitting abandonment of that portion of its line known as the Landenburg Branch which extends from Valuation Station 63+00 to the end of the branch at Valuation Station 537+78, a distance of approximately 8.99 miles, all in New Castle County, Del. Notice was properly posted and served and numerous protests to the application were received by the Commission.

The application was referred to an Administrative Law Judge and a hearing was held at Wilmington, Del., September 8 and 9, 1976. Appearing in opposition at the hearing were Delaware, the United Transportation Union, which seeks imposition of the "Burlington" protective conditions should the proposed abandonment be approved, NVF, the largest freight receiver on the line, and Historic Red Clay Valley, Inc. (Historic), a nonprofit organization which operates a scenic steam railroad over portions of the branch.

INITIAL DECISION

The initial decision, dated December 8, 1976, recommended denial of the application. The Administrative Law Judge found that although the Commission has consistently used the 50-percent rule in measuring off-branch expenses in rail abandonment proceedings, the approval and adoption of the variable unit cost method in Ex Parte No. 274 (Sub-No. 2), *Abandonment of Railroad Lines and Discontinuance of Service,* regulations served November 5, 1976, report served November 10, 1976, constrained him to conclude that applicant's use of the latter formula was not improper. He determined that the B&O's estimates of the costs of rehabilitation and normalized maintenance were, however, inflated, and considered the estimates presented by NVF's engineering witness to be more reasonable and acceptable approximations of the expenditures actually required. In addition, the Administrative Law Judge stated that the railroad's operations over the involved line had been and would continue to be profitable in the reasonably near future, and indicated that the same conclusion would have been warranted even if applicant's "substantially overstated" estimates had been accepted. He found that the B&O's anticipation of minimal future earnings was insufficient reason to justify the proposed abandonment in view of what he determined to be the "serious, adverse effects" such action would have on the two major users of the line and concluded that resulting motor carrier movements would "materially increase" local traffic congestion and safety hazards.

EXCEPTIONS AND REPLIES

In its exceptions to the initial decision the B&O asserts that the Administrative Law Judge erred in concluding that the proposed abandonment would have serious, adverse effects on the two major users of the line and in determining what the economic hardships to those users would be. The railroad notes certain computational errors in the assessment of impact on NVF and questions the relative seriousness of the additional costs and expenditures actually claimed. Applicant argues further that the Administrative Law Judge's estimate of increased motor carrier movement was high and that his conclusion that Historic would lose its entire capital investment and future profits was speculative and without proper basis.

The B&O next excepts to the rejection of its estimated costs of rehabilitation and normalized maintenance and to the acceptance and assessment of protestant NVF's estimates on those expenses. The railroad contends that the Administrative Law Judge improperly characterized the required rehabilitation and its purpose, and that by tying applicant's rehabilitation program to the attainment of Federal Railroad Administration (FRA) class I track safety standards he ignored the reality of the line's overall poor condition. Averring that his characterization of the normalized maintenance program was also erroneous, applicant submits that a patchwork program to maintain a railroad at minimum safety standards is unacceptable from a proper operating standpoint.

Finally, applicant maintains that the Administrative Law Judge's conclusion that the line has been and will continue to be operated on a profitable basis was erroneous. The railroad argues that his method of computation with regard to the historic and prospective financial performance of the branch was incorrect, that past operations were improperly determined to be profitable and that conclusions of future economic viability were drawn without proper consideration of potential traffic or of the ability of applicant to recoup required expenditures for rehabilitation and normalized maintenance.

In reply, NVF argues that the Administrative Law Judge was correct in his conclusions and that his decision should be affirmed. NVF maintains that the error in the recitation of figures regarding adverse effect was harmless and that approval of the application would result in prohibitive expense to it. NVF submits further that the Administrative Law Judge's finding of potential harm to

Historic was based upon unchallenged and uncontroverted evidence and that his estimate of additional truck movements and conclusions regarding increased congestion and safety hazards were supported by the record. With respect to estimates of rehabilitation and maintenance, the protestant asserts that the B&O has ignored the fact that the Landenburg Branch, being a low-density line, does not need more than minimum attention, that rehabilitation beyond class I standards would be a waste of resources and that a proper foundation for applicant's cost estimates was never established. NVF further contends that the application of variable unit costs to determine off-branch expenses was not justified, but that even if that method is used, the evidence indicates past and future profitability.

Delaware, in its brief which is treated here as a reply to applicant's exceptions, asserts that the Administrative Law Judge's estimate of additional motor carrier movement is correct, and that any increase in such traffic in the area resulting from abandonment would create an undue burden on the State and its citizens.

PROCEDURAL MATTERS

The Commonwealth of Pennsylvania asserts as grounds for its petition for leave to intervene first, that the initial decision indicated that an NVF plant located in the Commonwealth might be adversely affected if the application were granted, and second, that the initial decision was the first instance in which the standards promulgated in Ex Parte No. 274 (Sub-No. 2), *supra,* were utilized to change the Commission's abandonment standards in "ordinary nonsubsidy proceedings." Replying to the petition, the B&O contends that the Commonwealth has failed to demonstrate good cause for permitting intervention and in related pleadings applicant moves to strike that portion of the NVF reply relating to variable unit costing and replies to both petitioner's reply and to that portion of the NVF reply sought to be stricken. As ground for the motion to strike applicant urges that NVF's argument on off-branch costing methodology is on matters not raised on exceptions and is, therefore, outside the scope of a proper reply. NVF argues in response that the considered portion of its reply is essential to a proper rebuttal of applicant's exception to the Administrative Law Judge's finding on profitability of the line, and is thus within the legitimate scope of a reply.

We believe that petitioner has shown good cause for permitting intervention. There is some evidence that a grant of the application could result in the closing or curtailment of operations of the NVF plant on the Landenburg Branch, and that this in turn might have an adverse effect upon operations at two other NVF plants, one of which is located at Kennett Square, Pennsylvania. These facts could not reasonably have been known to Commonwealth officials prior to the presentation of NVF's evidence at the hearing. In addition, this proceeding, due to applicant's reliance upon variable unit cost data and its reference to the standards set forth in Ex Parte No. 274 (Sub-No. 2) *supra,* may be said to have taken on a greater general importance than could have originally been anticipated. Intervention by Pennsylvania would not broaden the issues. See rule 72(b), (e), Commission Rules of Practice; 49 CFR §1100.72(b), (e).

We further believe that the matter in NVF's reply which applicant has moved to strike should be allowed to stand. NVF's arguments are relevant to the disposition of issues raised by applicant's own approach to establishing the costs and revenues of the line in question. See rules 96(b) and 23(a); 49 CFR §§1100.96(b), .23(a). Under these circumstances the B&O's replies to petitioner's reply and to that portion of the NVF reply sought to be stricken should be accepted as rebuttal argument, and the stricture in rules 96(b) and 23(a) against a reply to a reply is hereby waived to permit acceptance of applicant's last-tendered pleading.

In its reply to applicant's exceptions, petitioner maintains that the costing standards in Ex Parte No. 274 (sub-No. 2) *supra,* do not apply to abandonment applications but only to subsidies following abandonment and that the Commission should give no weight to the "subsidy standards" promulgated in that proceeding. The B&O, replying to petitioner's reply, asserts that the Commission adopted variable unit costing of off-branch expenses for use in both abandonment applications and in financial assistance computations, and, responding to that segment of the NVF reply sought to be stricken, generally submits that the application of that methodology to the instant proceeding is proper.

Discussion and Conclusions

Applicant's first exception relates to certain alleged errors in the initial decision with respect to the effects of abandonment. The Administrative Law Judge stated that if the application were granted NVF would be forced to make a capital expenditure of $279,600 to permit receipt of materials by motor carrier, and would incur increased plant operating costs of $67,046 per year and added transportation costs of $301,546 per year. From the record, however, it appears that NVF asserted that approval of the instant application would necessitate its expending some $279,600 for capital improvements and $67,046 per year in added transportation costs to provide for combination truck-rail service to its facility on the considered branch.[1] Regarding the claimed error in the estimate of increased motor carrier traffic, the Administrative Law Judge found that motor carrier service to protestant NVF's Yorklyn facility would involve a movement of between 40 and 50 truckloads per week, and the record indicates evidence of an estimated increase of 20 to 25 loads per week, which would constitute 40 to 50 movements per week. With respect to the losses anticipated by Historic, the initial decision accurately reflects the contentions of the scenic railroad that it would lose its entire $250,000 capital investment and all profits from future operations, and, as noted by NVF in reply, those averments were not controverted by the applicant. The error made in the recitation of evidence presented by NVF is harmless here, for even as corrected those amounts represent substantial anticipated expenditures on the part of the protestant. The Administrative Law Judge's conclusion that abandonment would have "serious, adverse effects" upon users of the line is fully substantiated by the record.

As to the next line of exceptions, the applicant's assertions that meeting any set FRA standard is not and should not be the goal of rehabilitation and maintenance might be defensible from a strictly commercial viewpoint; the railroad desires to avoid costly service failure, which would be far more likely to occur if a "minimal maintenance" program were followed than if the line were rehabilitated to the extent that day-to-day inspection and maintenance would not be required. However, the B&O's desire to rehabilitate to a particular level cannot govern where, as here, more broadly based considerations of public convenience and necessity are paramount. All evidence indicates that the branch currently meets or exceeds FRA class I standards,[2] that usage of the line has been and will continue to be at a magnitude more closely associated with applicant's side track than with its branch lines and that users of the line have not been dissatisfied with existing service. The B&O calculates, however, that the cost of rehabilitating the line to the appropriate operating standard would be $267,925 and that the future normalized maintenance costs for the next 20 years would be $81,275, while protestant NVF estimates that only $7,900 need be expended to correct certain potential derailment possibilities[3] and that the expected annual maintenance cost for the next 10 years would be $11,350. It is difficult to ascertain which of the two conflicting sets of estimates is more realistic since each is based upon different judgmental factors, and it appears from an examination of the record that although applicant's figures may be overstated, those of the protestant may be too conservative. The Administrative Law Judge, who had opportunity to observe and examine the witnesses, accepted the estimate presented by the protestant's expert, whose calculations appear to have been made following more thorough examinations of the line in question, and we see no reason to disturb those findings.

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[1] NVF appeared to have discounted the alternative of wholly motor carrier movement as infeasible, capital investment and additional annual costs being estimated at $65,100 and $301,546, respectively.

[2] Compare Ex Parte No. 274 (Sub-No. 2), reggulations at 49 CFR §1121.42(b), applicable to abandonment applications filed on or after November 1, 1976, which disallows rehabilitation costs unless the involved track does not meet FRA class I standards or the potential subsidizer requests a level of service which requires rehabilitation expenditures.

Similarly, the Administrative Law Judge's determinations regarding present and future profitability of the line represent an accurate appraisal of the evidence presented. Utilizing the revenue and expense data for a 6-month period in 1976, annualized, and substituting NVF's maintenance estimate in lieu of the actual expenditure of $18,035, which was found to be nonrepresentative (all as indicated in applicant's brief), and adding $6,000 as revenue from Historic (which receipts are seasonal and not accurately reflected in the 6-month figures) resulted in a net annual profit forecast of $11,035.

Relevant to the issue of profitability of the line is the question of the use herein of the variable unit costing methodology for determining expenses beyond the line. Ex Parte No. 274 (Sub-No. 2), on which the Commonwealth of Pennsylvania seeks interpretation, is not applicable to this proceeding which was pending as of the date of enactment of section 1a of the act.[4] Since we have taken cognizance of the content of those regulations, however, we note that petitioner's position, that the new regulations apply no costing standards to abandonment proceeding, is incorrect. See Ex Parte No. 274 (Sub-No. 2), *supra*, regulations at 49 CFR §§1121.32(d)(1), .40(a)(1); report at 4-5, 47. With respect to the instant application, since all revenue generated by freight originating at or destined to points on the line is ultimately attributed to the line,[5] the most accurate method for determining the expense of handling that traffic beyond the branch should be employed. The 50-percent rule advocated by protestant NVF, long permitted by the Commission as an acceptable indicator of off-branch costs when more complete and substantiated data were unavailable,[6] need not be arbitrarily imposed where, as here, such other data are available. Although the variable unit cost method relies on system averages and cannot be said to provide an exact calculation of off-branch costs, the expense amount so derived can be assumed to be more accurate than one ascertained through the mechanical application of a percentage formula based not on evidence of record but merely upon prior Commission acceptance.

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[3] The inital decision quoted the NVF "rehabilitation" figure as $8,000.

[4] Section 1a(8) of the act, as here pertinent, provides that petitions for abandonment filed and pending as of the date of enactment of new section 1a (February 5, 1976), shall be governed by provisions of section 1 in effect on that date. Former section 1(19) provided that abandonment applications were under such rules and regulations as the Commission might prescribe. As pertinent here, regulations governing abandonments filed and pending on February 5, 1976, are contained in former part 1121 of Title 49 of the Code of Federal Regulations, prior to revision in Ex Parte No. 274 (Sub-No. 2).

The Administrative Law Judge cited only Ex Parte No. 274 (Sub-No. 2), *supra*, in finding that applicant's use of variable unit costs was not improper, but implicit in the initial decision was his determination not to be bound by the new regulations, which, as noted above, are inapplicable to this proceeding, but rather to be guided by them as an expression of Commission approval of a particular off-branch costing methodology.[7] Ex Parte No. 274 (Sub-No. 2) introduced no guidelines not previously accessible to the applicant, and we see no reason to reject the variable unit cost method where, as here, opposing parties have had adequate notice of applicant's intention to rely upon that technique and access to and opportunity to cross-examine upon both the utilized formula and the underlying workpapers. Cf. *East Carolina Ry. Abandonment*, 324 I.C.C. 506, 513 (1964); *Chicago & N. W. Ry. Co. Abandonment*, 275 I.C.C. 759, 774 (1951).

Abandonment of the Landenburg Branch would substantially and detrimentally affect users of the line, outweighing any financial burden placed upon the applicant in keeping the branch in service.

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[5] See *Northwestern Pacific R. Co. Abandonment*, 312 I.C.C. 783, 786-87 (1962).

[6] See *Chicago, M., St. P. and P. R. Co. Abandonment*, 348 I.C.C. 749, 752 (1976), and decisions cited therein.

[7] Ex Parte No. 274 (Sub-No. 2), regulations at 49 CFR §1121.42(m)(1), requires that off-branch costs in abandonment applications filed after November 1, 1976, be computed by applying variable unit costs to the service units attributed to the branch traffic.

Based upon the evidence of record, we cannot find that continued operation of the line burdens the applicant's system, and we must conclude that it has not met its burden of justifying the proposed abandonment.

An appropriate order will be entered.

COMMISSIONER MACFARLAND, dissenting in part, voted to deny the petition for leave to intervene filed by the Commonwealth of Pennsylvania, to grant the B&O's motion to strike a portion of the NVF reply, and to *sua sponte* strike applicant's replies to replies.

DOCKET NO. AB-36 (SUB-NO. 2)

OREGON SHORT LINE RAILROAD AND THE UNION PACIFIC RAILROAD COMPANY—ABANDONMENT PORTION GOSHEN BRANCH BETWEEN FIRTH AND AMMON, IN BINGHAM AND BONNEVILLE COUNTIES, IDAHO

Decided July 22, 1977

On reconsideration, the employee labor protective conditions imposed in the prior report and order granting abandonment, modified. Imposition of appropriate employee protective conditions generally applicable in all abandonment proceedings discussed.

Notice published in *Federal Register* of findings herein.

Joseph D. Anthofer for petitioner.

REPORT OF THE COMMISSION ON RECONSIDERATION

DIVISION 3, ACTING AS AN APPELLATE DIVISION, COMMISSIONERS BROWN, MACFARLAND, AND CHRISTIAN

BY DIVISION 3:

By application filed April 9, 1974, under section 1(18)-(20) of the Interstate Commerce Act (act), Oregon Short Line Railroad Company (Oregon Short Line) and Union Pacific Railroad Company (Union Pacific) seek a certificate of public convenience and necessity permitting abandonment by the former and abandonment of operations by the latter, of a portion of Oregon Short Line's line extending from milepost 0.06 near Firth in a northeasterly direction to milepost 17.53 near Ammon, a distance of 17.59 miles, in Bingham and Bonneville Counties, Idaho.

A protest to the application was filed by Glenn Blatter, a large scale farmer in the area, who contended that the proposed abandonment would increase his cost of doing business, and by the Railway Labor Executive's Association (RLEA) on the grounds that the abandonment could have an adverse impact on employees. RLEA requested imposition of the conditions for protection of employees set forth in *Chicago, B. & Q. R. Co. Abandonment*, 257 I.C.C. 700 (1944), hereinafter "Burlington" conditions.

By order entered April 27, 1976, the proceeding was assigned for handling under modified procedure. Protestant Glenn Blatter did not timely file a verified statement. However, he subsequently filed a petition to reopen the proceeding and by order of the Commission, Commissioner Brown, dated November 6, 1976, his petition to reopen the proceeding was granted and a proffered verified statement was accepted. Applicants' rebuttal statement was filed on December 17, 1976.

By report and order, dated January 28, 1977, Review Board Number 5 found that due to light traffic on the line and the general availability of alternate transportation, that the present and future public convenience and necessity permitted abandonment of the line and operations over it, subject to the same conditions for the protection of employees as set forth in *Chicago, B. & Q. R. Co. Abandonment, supra,* as supplemented by section 405 of the Rail Passenger Service Act (45 USC 565), hereinafter section 405 of RPSA, and subject to certain other conditions concerning disposition of the right-of-way for public use.

PETITION FOR RECONSIDERATION

Applicants, Oregon Short Line and Union Pacific, filed a petition for reconsideration of the report and order of the review board on March 9, 1977. Their argument is that only the "Burlington" conditions should be imposed, and that it was error to impose "Burlington" conditions as supplemented by section 405 of the RPSA. Applicants refer to these as the "Amtrak" conditions. They argue that while section 1a(4) permits imposition of "Amtrak" conditions in certain situations, section 1a(8) of the act mandates that only sections 1a(6) and (7) of the act apply abandonments filed prior to promulgation of the new abandonment regulations in Ex Parte No. 274 (Sub-No. 2), *Abandonment of Lines and Discontinuance of Service* (1976), on November 1, 1976. Oregon Short Line and Union Pacific, therefore, maintain that since this application was filed on April 9, 1975, there is no statutory basis for imposition of the "Amtrak" conditions in this proceeding. In their view, RLEA has presented no evidence to justify employee protective conditions other than the "Burlington" conditions, and the report and order of the review board should be so modified.

Discussion and Conclusions

This proceeding raises two broad issues: the specific content and quality of employee labor protection afforded by Public Law 94-210, the Rail Revitalization and Regulatory Reform Act of 1976, hereinafter the 4R Act, and whether or not such employee protective conditions should be extended to abandonment proceedings pending before enactment of the 4R Act or promulgation of the Commission's revised abandonment regulations in Ex Parte No. 274 (Sub-No. 2), *supra*.

The 4R Act enacted new section 1a of the act, which substantially altered the statutory scheme for the abandonment of lines and discontinuance of service, formerly found in section 1(18)-(22) of the act. It greatly expanded and changed the type of notice which is required to be given by a railroad proposing to abandon a line or discontinue service; it provided an opportunity for persons wishing to preserve rail service over a line, with respect to which the Commission has found that the public convenience and necessity permit abandonment or discontinuance, to offer financial assistance; and further provided that the Commission must defer issuance of a certificate authorizing abandonment or discontinuance to permit negotiation of a financial assistance agreement in such situations. New section 1a(4) of the act outlines the employee protective conditions to be imposed in abandonment proceedings. It states: "Each such certificate which is issued by the Commission shall contain provisions for the protection of the interests of employees. Such provisions shall be at least as beneficial to such interests as provisions established pursuant to section 5(2)(f) of this act and pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565)." Section 5(2)(f) of the act formerly encompassed all of the relevant statutory reference to employee labor protection. Section 402 of the 4R Act amended section 5(2)(f) by inserting the following sentence immediately preceding the last sentence of the paragraph: "Such arrangement shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565)." Therefore, as amended, section 5(2)(f) states:

> As a condition of its approval, under this paragraph (2) or paragraph (3), of any transaction involving a carrier or carrier by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the

> interest of the railroad employees affected. In its order of approval, the Commission shall include terms and conditions providing that during the period of 4 years from the effective date of such order, such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Such arrangement shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565). Notwithstanding any other provisions of this act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Finally, important to our discussion herein is new section 1a(8) of the act. This section outlines the statutory requirements concerning the implementation of the various paragraphs of section 1a, including the employee protection mandated by paragraph (4). Paragraph (8) states: "Petitions for abandonment or discontinuance which were filed and pending before the Commission as of the date of enactment of this section or prior to the promulgation by the Commission of regulations required under this section shall be governed by the provisions of section 1 of this act which were in effect on such date of enactment, except paragraphs (6) and (7) of this section shall be applicable to such petitions." Section 1 of the act, prior to amendment by the 4R Act, contained paragraphs (18) through (22) relating to abandonment of lines and discontinuance of service. Paragraphs (6) and (7) of the new section 1a concern offers of financial assistance for lines for which findings that the present and future public convenience and necessity require abandonment have been made. No provisions concerning employee labor protection are found in paragraphs (6) and (7).

Prior to addressing the question of the employee labor protective conditions to be imposed in abandonment proceedings filed prior to promulgation of new abandonment regulations on November 1, 1976, we should examine both the congressional and Commission actions in the area of employee protection. This review specifically entails the conditions developed by the Commission to implement the mandate of section 5(2)(f) from its enactment through its amendment by the 4R Act in 1976.[1]

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[1] Employee labor protective conditions in abandonment applications under section 1 of the act are not imposed pursuant to section 5(2)(f) but are imposed under the Commission's discretion as enunciated in *I.C.C. v. Railway Labor Executives Association*, 315 U.S. 373 (1942). These conditions are in many respects identical to those imposed pursuant to section 5(2)(f).

Section 5(2)(f), as enacted in 1940, sought to establish criteria for employee protection in certain types of transactions between common carriers by railroad. It provides for Commission approval of fair and equitable arrangements for employee labor protection in those proceedings approved pursuant to section 5(2) of the act. The Commission is directed to provide for appropriate terms and conditions, so that during the 4-year period subsequent to the effective date of the order approving a transaction, no employee of the carrier or carriers would be placed in a worse position with respect to his employment than prior to the transaction. The only exception to this requirement is that an employee may be protected for a shorter period of time, equaling his length of employment with the affected carrier. The final sentence of the section states that a carrier, or carriers, and duly authorized employee representatives could enter into agreements for the protection of employees, notwithstanding the general requirements of section 5(2)(f).

Prior to the enactment of section 5(2)(f), most of the railroads and employee brotherhoods had entered into an agreement entitled the "Agreement of May, 1936, Washington, D.C.," hereinafter "Washington Job Agreement," which was designed to provide for protection for railway employees affected by "coordination" projects. The Washington Job Agreement defined "coordination" as "joint action by two or more carriers, whereby they unify, consolidate, merge or pool in whole or in part their separate facilities." Section 6(a) of the agreement provides that an employee displaced as a result of a coordination could not be placed in a worse condition than he occupied at the time of coordination for a period not exceeding 5 years. A displacement allowance is to be computed as a monthly allowance using the employee's average compensation during a 12-month period prior tc displacement as a basis. Other sections of the agreement provide formulas for compensation of various classes of affected employees.[3] The Washington Job Agreement provides for up to 5 years of protection from the time the employee is adversely affected as a result of the approved coordination, while section 5(2)(f) guarantees minimum protection of 4 years from the effective date of order approving the transaction.

We imposed employee labor protection pursuant to the mandate of section 5(2)(f) in *Oklahoma Ry. Co. Trustees Abandonment*, 257

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[3] The monthly allowance for employees deprived of employment as a result of the coordination is computed in a somewhat different manner in section 7a. It is 60 percent of the employee's monthly compensation using a 12-month period prior to dismissal as a basis.

I.C.C. 177 (1944), hereinafter "Oklahoma" conditions. We opted for a scheme which provided employee protection extending from the date on which the employees were displaced to the expiration of 4 years from the effective date of the Commission's order approving the transaction.

In most other respects, the employee protection imposed was similar to that contained in the Washington Job Agreement, except it used similar computations for determining the base period compensation for both displaced and dismissed employees. As previously stated, the Washington Job Agreement contains a different computation for the compensation for dismissed employees. Under the "Oklahoma" conditions an employee's outside earnings and unemployment insurance are deducted from his dismissal allowance, while under the Washington Job Agreement only income earned from other railroads is offset against his dismissal allowance. No lump sum separation allowance is available under the "Oklahoma" conditions.

Another key difference is in the exercise of seniority rights to a job after approval of the transaction. Under the Washington Job Agreement an employee must exercise his seniority rights to an available and comparable job (not requiring a change in residence), or he will be treated as "occupying the position which he elects to decline" and, accordingly, only draw a compensation allowance between his previous earnings and the pay he would have received had he actually taken the job his seniority entitled to him to. Under the "Oklahoma" conditions, if an employee does not exercise his seniority rights to an available and comparable job (no reference to a change in residence), he is not entitled to an allowance. The arbitration procedure for disputes established under the Washington Job Agreement provided for a two-step procedure, while the "Oklahoma" conditions provided for only a one-step machinery. The Oklahoma proceeding involved the purchase of certain lines and the acquisition of trackage rights, with some minor, concurrent abandonments.

Later in 1944, we imposed employee protective conditions in *Chicago, B. & Q. R. Co. Abandonment, supra,* an abandonment proceeding. The "Burlington" conditions are identical to the "Oklahoma" conditions except that the protective period extends from the date on which the employee was displaced to the expiration of 4 years from the effective date of the certificate authorizing abandonment. It was found in that case that the authority of the Commission to impose employee labor protective conditions for employees adversely affected by abandonment arises under section 1 of the act and not under section 5(2)(f). In section 1 cases, the Commission has authority to impose labor protection conditions in its discretion, but has no such statutory obligation to do so. *I.C.C.* v. *Railway Labor Executives' Association*, 315 U.S. 373 (1942).

The final conditions developed under section 5(2)(f) were those imposed in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952), a proceeding encompassing abandonment, consolidation, and construction of a terminal facility. The conditions formulated in this matter incorporated provisions of the "Oklahoma" conditions. However, the protective period was expanded to provide an alternative computation extending for up to 5 years from the time the protected employee was adversely affected, as specified in the Washington Job Agreement. It was stated in *New Orleans Union Passenger Terminal Case, supra*, at 282:

> That employees adversely affected within 4 years from the effective date of the order approving the transaction shall receive as a minimum the protection afforded by conditions 4 to 9 inclusive, in *Oklahoma Ry. Co. Trustees Abandonment, supra*, at 197-201, as prescribed in the report and order approving the transaction, for the period they are adversely affected prior to May 17, 1952 (4 years from the effective date of the order of approval), and such employee so adversely affected who has received under such conditions total dismissal or displacement compensation less than that which he would receive by applying the Washington Agreement, as limited, for the full protective period therein provided from the time he is first adversely affected, shall continue to receive benefits under the terms of the Washington Agreement, as limited, until the total compensatory benefits provided therein for his particular period of service have been paid.[3]

This alternate compensation computation provided for in the "New Orleans" conditions incorporated the Washington Job Agreement's definition of the protective period as starting from the date the protected employee is adversely affected, rather than our prior practice of beginning the protective period from the effective date of the order authorizing the transaction. Secondly, this alternative computation provided for a protective period of up to 5 years. The methods for computation of the monthly displacement allowance, and the computation of the base for the displacement allowance is that adopted in the "Oklahoma" and "Burlington" conditions. It should be noted that although the protective period under the Washington Job Agreement is for a more extensive period of time (i.e. 5 years), it is subject to a different method of computing the allowance for severed or dismissed employees.

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[3] This compensation was to be reduced, for dismissed employees, by amounts received from other employment and unemployment compensation, as in the "Oklahoma" and "Burlington" conditions—as contrasted with the Washington Job Agreement's nonrecognition of these alternative sources of income.

By their incorporation of certain features of the Washington Job Agreement, notably the 5-year protective period and the computation of the protective period from the date the employee was adversely affected by the transaction approved by the Commission, the "New Orleans" conditions significantly expanded the employee labor protection provided pursuant to section 5(2)(f) of the act. The *New Orleans Passenger Terminal Case, supra,* was decided by the Commission on remand, since in *Railway Labor Executives' Association* v. *United States,* 339 U.S. 142 (1950) the Supreme Court stated that the employee protection mandated by section 5(2)(f) of the act is a statutory minimum and that the Commission was not required to limit employee labor protection to 4 years from the effective date of order, as stated in the statute.

The arbitration conditions contained in the "New Orleans" conditions were subsequently modified in *Southern Ry. Co.—Control—Central of Georgia Ry. Co.,* 317 I.C.C. 557 (1962) and *St. Louis Southwestern Ry.—Pur.—Alton and Southern R.,* 342 I.C.C. 498, 522 (1972).

This review of the prior conditions developed pursuant to section 5(2)(f) of the act indicates a trend toward increased protection beyond the statutory minimums set out in that section of the act. In certain situations we have imposed employee labor protection conditions commonly referred to as "attrition" conditions. This was done in *Chesapeake & O. Ry. Co.—Control—Western Maryland Ry. Co.,* 328 I.C.C. 684 (1967). Similar attrition-type conditions were imposed by Congress in Title V of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 777), hereinafter the 3R Act. However, we have generally not imposed attrition conditions under section 5(2)(f), and have rejected such conditions, except where they have been agreed to between applicants and their employees. It has been stated that the routine imposition of such conditions would not be in the public interest and that conditions calculated to preserve unneeded jobs would unduly restrict the applicants in establishing economical operations, would be wasteful, and would also be in conflict with the objectives of the national transportation policy. See *Missouri Pac. R. Co.—Merger—T&P and C&EI,* 348 I.C.C. 414

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(1976); see also *Erie R. Co. Merger,* 312 I.C.C. 185, 196 (1960); *Southern Ry. Co.—Control—Central of Georgia Ry. Co., supra* at 565 and *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line,* 320 I.C.C. 122, 201 (1963). The overall purpose of section 5(2)(f) was not to freeze jobs but to provide compensatory conditions, *Maintenance Employees* v. *U.S.,* 366 U.S. 169, 175-76 (1961). Similarly, see *Norfolk & Western R. Co.* v. *Nimitz,* 404 U.S. 37, 42 (1971). We have not imposed attrition-type conditions where there has been no prior agreement between the parties, unless the record clearly supports a finding that such conditions are necessary to provide a fair and equitable agreement to protect the interests of the affected employees.

Moreover, we view the enactment of Title V of the 3R Act, and attrition conditions in general, as a development arising outside the mainstream of employee labor protection under section 5(2)(f) of the act. The 4R Act, and its reliance on section 405 of the RPSA and the agreement entered into pursuant to it, as discussed below, represent Congress' intent in expanding the general scope of employee protective conditions. As discussed in *Missouri Pac. R. Co.—Merger—T&P and C&EI, supra,* at 427, the attrition-type conditions in Title V were designed to guarantee certain benefits already possessed by former Penn Central employees. This, as well as Federal funding of the cost of this employee protection, makes this arrangement somewhat unique.

The employee protective conditions enacted in and developed pursuant to section 405 of the RPSA represent a continuation and acceleration of the trend towards increased employee protection. In an appendix hereto is the text of section 405 of the RPSA and the agreements for employee protection entered into pursuant to that section. It should be noted that paragraph (a) requires that a railroad provide fair and equitable arrangements to protect the interests of employees. Then, minimum substantive requirements to be embraced in such employee protection are outlined in paragraph (b).[4] These substantive requirements are supplemented by the caveat that such arrangements for employees shall, in no event, provide benefits less than those established pursuant to section 5(2)(f) of the act. Thus, the agreements to be subsequently negotiated could not provide protection less extensive than that contained in the "New Orleans" conditions.

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[4] In this respect, section 405 of the RPSA is structured quite similarly to section 5(2)(f) of the act, prior to its amendment; it sets out statutory minimums which can be supplemented by negotiation between the parties. Pursuant to section 5(2)(f) of the act, the minimum employee labor protection may be supplemented by the Commission or by agreement between the parties. See *Railway Labor Executives' Assn.* v. *United States, supra.*

However, these statutory minimums would appear to be of little actual utility, since the arrangement for protection of employees negotiated between the National Railroad Passenger Corporation and the railway employee representatives and approved by the Secretary of Labor on April 17, 1971, pursuant to section 405(a) of the RPSA, provide for more extensive employee labor protection than section 5(2)(f) of the act and the conditions developed pursuant to it. The substance of the protection outlined in the agreement negotiated pursuant to section 405 of the RPSA is generally similar to that outlined in the "New Orleans" conditions. Some major differences include a redefinition of the protective period and an extension of the time encompassed by the protective period. The protective period is defined as that period of time during which a displaced or dismissed employee is to be provided protection and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom. However, the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the Corporation prior to the date of his displacement or dismissal. The monthly allowance for displaced and dismissed employees is computed similarly to that specified in the "Oklahoma" conditions and the first method of computation specified in the "New Orleans" conditions. Other features include a separation payment in lieu of a dismissal allowance to be computed according to section 9 of the Washington Job Agreement, a training or retraining provision, and slight modifications of the section on arbitration of disputes.

Based on this discussion, it is clear that Congress intended section 405 of the RPSA, and the agreement developed pursuant to that section, to be the substantive standard for employee protection in all Commission proceedings. Section 405 of the RPSA dictates a statutory minimum protection no less than that established pursuant to section 5(2)(f) of the act. And since the agreement entered into pursuant to section 405 mandates employee labor protection considerably more extensive than the "New Orleans" conditions and is inclusive of those conditions, it would be redundant to impose both section 5(2)(f) protection *and* section 405 of the RPSA. For example, employee labor protection under section 5(2)(f) extends from date of order or certificate for a period of 4 years, or as in the alternative computation in "New Orleans" conditions, 5 years from date of adverse effect. The agreements developed under section 405 of the RPSA provide for a protective period extending 6 years from the date the protected employee is adversely affected. In light of this discussion, it would, therefore, be appropriate to impose labor protective conditions pursuant to both section 5(2)(f) and 1(a)(4) of the act which provide for employee labor protection enacted in and developed pursuant to section 405 of the RPSA. We remain cognizant of the Supreme Court's interpretation of the mandate of section 5(2)(f), as expressed in *Railway Labor Executives' Assn.* v. *United States, supra*, that the employee labor protection required by section 5(2)(f) of the act is a minimum requirement and that additional employee labor protection may be imposed in situations which would warrant it.

The precise issue raised in this proceeding is the imposition of provisions for employee protection enacted in and developed pursuant to section 405 of the RPSA to those cases filed prior to our promulgation of new abandonment regulations in Ex Parte No. 274 (Sub-No. 2) on November 1, 1976. Petitioners herein have argued that the imposition of such conditions is not required by the clear language of section 1a(8) of the act, while the review board imposed the "Burlington" conditions as supplemented by section 405 of the RPSA.

Though we agree with the petitioners that the 4R Act does not require imposition of more extensive employee labor protection in those applications filed prior to November 1, 1976, we believe that this is not of particular significance. Until passage of the 4R Act, imposition of employee labor protective conditions in abandonments had always been discretionary, as had the level of protection imposed. See *I.C.C.* v. *Railway Labor Executives' Association, supra.* In the exercise of this discretion, we have routinely imposed the "Burlington" conditions. However, the level of employee protection envisioned by Congress in its enactment of the 4R Act should not go unheeded in our proceedings. By enactment of section 1a(4) of the act, Congress clearly indicated its current policy that in proceedings for abandonment and discontinuance under section 1a of the act affected railway employees should be provided with the protection enacted in and developed pursuant to section 405 of the RPSA, as a minimum. Imposition of such employee labor protection will be mandatory in applications filed subsequent to November 1, 1976, and we believe that in order to assure fair and uniform treatment of railroad employees, the employee labor protection enacted in and developed pursuant to section 405 of the RPSA should also be imposed in those abandonment proceedings filed prior to November 1, 1976, including the instant matter. To do so is clearly within our power as enunciated in *I.C.C.* v. *Railway Labor Executives' Association, supra.* It would appear to be redundant to impose the "Burlington" conditions or any conditions developed under section 5(2)(f), as modified by section 405 of the RPSA, since the employee protection enacted in and developed pursuant to section 405 of the RPSA is all encompassing of prior section 5(2)(f) conditions.[5] Therefore, in all abandonment proceedings still pending which were filed prior to November 1, 1976, we shall (if we approve the abandonment) impose the employee labor protection enacted in and developed pursuant to section 405 of the RPSA.

Since our decision represents a significant policy change and interpretation, a synopsis of our findings herein will be published in the *Federal Register.* All other railroads and employee representatives may have an opportunity to intervene and present argument, if they so desire, by submitting written comments to the Interstate Commerce Commission within 15 days of the date of the aforementioned notice in the *Federal Register.*

Since we are providing an opportunity for interested parties to comment on this decision, we will retain jurisdiction in this proceeding and in other subsequent decided abandonment proceedings which were filed prior to November 1, 1976. At the close of the period specified for comments, we will review the comments received and consider the conditions specified in this report in light of such comments. Carriers may consummate abandonments during this period, but if they do so, they will be deemed to have no objection to the employee protective conditions specified in this report. However, if after comments it is determined that other labor protective conditions are more appropriate for employee protection, then in those proceedings not consummated, we will by our retention of jurisdiction, impose such other labor protective conditions.

To expedite this proceeding copies of this report and order shall be served on all railroads that have abandonment applications pending before the Commission and Clarence J. Chamberlain, Chairman, Railway Labor Executives' Association. Written comments should be submitted to the Commission within 15 days from date of publication of the aforementioned notice in the *Federal Register.*

An appropriate order will be entered.

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[5] As previously stated the "Burlington conditions" in most substantive respects are identical to the "Oklahoma" or "New Orleans" conditions developed under section 5(2)(f).

APPENDIX

Section 405 of the Rail Passenger Service Act (45 U.S.C. § 565)

(a) A railroad shall provide fair and equitable arrangements to protect the interests of employees, including employees of terminal companies, affected by a discontinuance of intercity rail passenger service whether occurring before, on, or after January 1, 1975. A "discontinuance of intercity rail passenger service" shall include any discontinuance of service performed by railroad under any facility or service agreement under sections 545 and 562 of this title pursuant to any modification or termination thereof or an assumption of operations by the Corporation.

(b) Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; (4) assurances of priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of Title 49. Any contract entered into pursuant to the provisions of this subchapter shall specify the terms and conditions of such protective arrangements. No contract under section 561(a)(1) of this title between railroad and the Corporation may be made unless the Secretary of Labor has certified to the Corporation that the labor protective provisions of such contract afford affected employees, including affected terminal employees, fair and equitable protection by the railroad.

(c) Upon commencement of operations in the basic system, the substantive requirements of subsections (a) and (b) of this section shall apply to the Corporation and its employees in order to insure the maintenance of the protective arrangements specified in such subsections, except that nothing in this subsection shall be construed to impose upon the Corporation any obligations of a railroad with respect to any right, privilege, or benefit earned by an employee as a result of prior service performed for such railroad. The Secretary of Labor shall certify that affected employees of the Corporation have been provided fair and equtiable protection as required by this section within 180 days after assumption of operations by the Corporation.

(d) The Corporation shall take actions as may be necessary to insure that all laborers and mechanics employed by contractors and subcontractors in the performance of construction work financed with the assistance of funds received under any contract or agreement entered into under this subchapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act. The Corporation shall not enter into any such contract agreement without first obtaining adequate assurance that required labor standards will be maintained in the construction work. Health and safety standards promulgated by the Secretary of Labor pursuant to section 333 of Title 40 shall be applicable to all construction work performed under such contracts or agreements, except any construction work performed by a railroad employee. Wage rates provided for in collective bargaining agreements negotiated under and pursuant to the Railway Labor Act shall be considered as being in compliance with the Davis-Bacon Act.

(e) The Corporation shall not contract out any work normally performed by employees in any bargaining unit covered by a contract between the Corporation or any railroad providing intercity rail passenger service on October 30, 1970, and any labor organization, if such contracting out shall result in layoff of any employee or employees in such bargaining unit.

(f) The Corporation shall take such action as may be necessary to assure that, to the maximum extent practicable, any railroad employee eligible to receive free or reduced-rate transportation by railroad on April 30, 1971, under the terms of any policy or agreement in effect on such date will be eligible to receive provided space is available, free or reduced-rate transportation on any intercity rail passenger service provided by the Corporation under this chapter, on terms similar to those available on such date to such railroad employee under such policy or agreement. However, the Corporation may apply to all railroad employees eligible to receive free or reduced-rate transportation under such policies or agreements, a single systemwide schedule of terms determined by the Corporation to reflect terms applicable to the majority of such employees under those policies or agreements in effect on April 30, 1971. The Corporation shall be reimbursed by the railroads by way of payment or offset for such costs, as may be incurred in providing transportation service to railroad employees under any policy or agreement referred to in the first sentence of this subsection, including the costs of implementing and administering this section. Within 90 days after the enactment of this sentence, each railroad shall enter into an agreement with the Corporation for the payment of such expenses. If the Corporation and a railroad are unable to agree as to the amount of any payment owed by the railroad under this subsection, the matter shall be referred to the Commission for decision. The Commission upon investigation, shall decide the issue within 90 days following the date of referral and its decision shall be binding on both parties. If any railroad company which operated intercity passenger service not under contract with the Corporation notifies the Corporation and railroads which have entered into the agreement specified above that it will accept the terms of the systemwide schedule of terms and the compensation specified in the agreement, such railroad company shall be reimbursed for services to railroad employees in accordance with the agreements. As used in this subsection, the term "railroad employee" means (1) an active full-time employee, including any such employee during a period of furlough or while on leave of absence, of a railroad or terminal company, (2) a retired employee of a railroad or terminal company, and (3) the dependents of any employee referred to in clause (1) or (2) of this sentence.

Pub. Law 91-518, Title IV, § 405, Oct. 30, 1970, 84 Stat. 1337; Pub. Law 92-316, §§ 7, 8, June 22, 1972, 86 Stat. 230.

SECTION 405 AGREEMENT

The scope and purpose of this appendix are to provide, pursuant to section 405 of the act, for fair and equitable arrangements to protect the interests of employees of railroad affected by discontinuances of Intercity Rail Passenger Service subject to section 405 of the act; therefore, fluctuations and changes in volume or character of employment brought about by other causes are not within the purview of this appendix.

ARTICLE I

1. *Definitions.*—The definitions in Article I of the Agreement and in the act apply in this appendix and in the event of conflict in definitions, those in the act shall be controlling. In addition, whenever used in this appendix, unless its context requires otherwise:

(a) "Transaction" means a discontinuance of Intercity Rail Passenger Service pursuant to the provisions of the act.

(b) "Displaced employee" means an employee of railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of railroad who, as a result of a transaction is deprived of employment with railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

(d) "Protective period" means that period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that there shall be no duplication or pyramiding of benefits to any employees, and, provided further, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits.

4. When railroad contemplates a transaction after May 1, 1971, it shall give at least twenty (20) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of railroad (including terminal companies and other enterprises covered by Article III of this appendix) and by sending registered mail notice to the representatives of such interested employees; if railroad contemplates a transaction on May 1, 1971, it shall give the notice as soon as possible after the signing of this Agreement, prior to May 1, 1971. Such notice shall contain a full and adequate statement of the proposed changes to be effected by such transaction, including an estimate of the number of employees of each class affected by the intended changes.

At the request of either railroad or representatives of such interested employees, negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix shall commence immediately and continue for not more than twenty (20) days from the date of notice. Each transaction which will result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of the twenty (20) day period there is a failure to agree, the negotiatons shall terminate and either party to the dispute may submit it for adjustment in accordance with the following procedures:

(a) Within five (5) days from the termination of negotiations, the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee, then the National Mediation Board shall immediately appoint a referee.

(b) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(c) The decision of the referee shall be final, binding, and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(d) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

Notwithstanding any of the foregoing provisions of this section, at the completion of the twenty (20) day notice period or on May 1, 1971, as the case may be, railroad may proceed with the transaction, provided that all employees affected (displaced, dismissed, rearranged, et cetera) shall be provided with all of the rights and benefits of this appendix from the time they are affected through to expiration of the seventy-fifth (75th) day following the date of notice of the intended transaction. This protection shall be in addition to the protection period defined in Article I, paragraph (d). If the above proceeding results in displacement, dismissal, rearrangement, et cetera other than as provided by railroad at the time of the transaction pending the outcome of such proceedings, all employees affected by the transaction during the pendency of such proceedings shall be made whole.

5. *Displacement allowances.*—(a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period). Both the above "total compensation" and the "total time for which he was paid" shall be adjusted to reflect the reduction on an annual basis, if any, which would have occurred during the specified 12-month period had Public Law 91-169, amending the Hours of Service Act of 1907, been in effect throughout such period (i.e., 14 hours limit for any allowance paid during the period between December 26, 1970, and December 25, 1972, and 12 hours limit for any allowances paid thereafter); provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

6. *Dismissal allowances.*—(a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall be adjusted to reflect on an annual basis the reduction, if any, which would have occurred during the specified 12-month period had Public Law 91-169, amending Hours of Service Act of 1907 been in effect throughout such period (i.e., 14 hours limit for any allowance paid during the period between December 26, 1970, and December 25, 1972, and 12 hours limit for any allowances paid thereafter); provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and railroad shall agree upon a procedure by which railroad shall be currently informed of the earnings of such employee in employment other than with railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, or failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible with the Corporation or a railroad (if he possess rights to return to his former railroad employment) after appropriate notification, if his return does not infringe upon employment rights of other employees under a working agreement.

7. *Separation allowance.*—A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

8. *Fringe benefits.*—No employee of railroad who is affected by a transaction shall be deprived during his protective period of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, relief, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of railroad, in active service or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

9. *Moving expenses.*—Any employee retained in the service of railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects,for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not to exceed 3 working days, the exact extent of the responsibility of railroad during the time necessary for such transfer and for a reasonable time thereafter and the ways and means of transportation to be agreed upon in advance by railroad and the affected employee or his representatives; provided, however, that changes in place of residence which are not a result of the transaction, which are made subsequent to the initial change or which grow out of the normal exercise of seniority rights, shall not be considered to be within the purview of this section; provided further, that the railroad shall, to the same extent provided above, assume the expenses, et cetera for any employee furloughed within three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provisions of this section unless such claim is presented to railroad within 90 days after the date on which the expenses were incurred.

10. Should railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. *Arbitration of disputes.*—(a) In the event railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this Article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committe, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by railroad, as the case may be, shall be

deemed the selected member, and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. *Losses from home removal.*—(a) The following conditions shall apply to the extent they are applicable in each instant to any employee who is retained in the service of railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective period as a result of the transaction and is therefore required to move his place residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. Railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee is under a contract to purchase his home, railroad shall protect him against loss to the extent of the fair value of any equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are made subsequent to the initial changes caused by the transaction and which grow out of the normal exercise of seniority rights, shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employees, or their representatives, and railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner: One to be selected by the representatives of the employees and one by railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when terminated or furloughed, even though in a different craft or class, on railroad which he is, or by training or retraining physically and mentally can become, qualified, not however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or retraining is requested by such employee, railroad shall provide for such training or retraining at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under sections 1 or 2 of this Article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Subject to this appendix, as if employees of railroad, shall be employees, if affected by a transaction, of separately incorporated terminal companies which are owned (in whole or in part) or used by railroad and employees of any other enterprise within the definition of common carrier by railroad in section 1(3) of part I of the Interstate Commerce Act, as amended, in which railroad has an interest, to which railroad provides facilities, or with which railroad contracts for use of facilities, or the facilities of which railroad otherwise uses; except that the provisions of this appendix shall be suspended with respect to each such employee until and unless he applies for employment with each owning carrier and each using carrier and to the National Railroad Passenger Corporation; provided that said carriers and the National Railroad Passenger Corporation shall establish one convenient central location for each terminal or other enterprise for receipt of one such application which will be effective as to all said carriers and the Corporation and Railroad shall notify such employees of this requirement and of the location for receipt of the application. Such employees shall not be entitled to any of the benefits of this appendix in the case of failure, without good cause, to accept comparable employment, which does not require a change in place of residence, under the same conditions as apply to other employees under this appendix, with the National Railroad Passenger Corporation or any carrier for which application for employment has been made in accordance with this section.

ARTICLE IV

Employees of railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between Railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to the Secretary of Labor for determination. The determination of the Secretary of Labor, or his designated representative, shall be final and binding on the parties.

ARTICLE V

1. It is the intent of this appendix to provide employee protections which meet the requirements of section 405 of the act and are not less than the benefits established pursuant to section 5(2)(f) of the Interstate Commerce Act. In so doing, changes in wording and organization from arrangements earlier developed under section 5(2)(f) have been necessary to make such benefits applicable to contemplated discontinuances of intercity rail passenger service affecting a great number of railroads throughout the Nation. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected, and such provision shall be renegotiated and resubmitted to the Secretary of Labor for certification pursuant to section 405 of the act.

Railroads with pending abandonment applications

Chicago & North Western Transportation Co.
Louisville & Nashville Railroad Co.
Missouri Pacific Railroad Co.
Penn Central Transportation Co.
Burlington Northern Inc.
Chicago, Milwaukee St. Paul & Pacific Railway Co.
St. Louis-San Francisco Railway Co.
Norfolk & Western Railway Co.
Chicago & Eastern Illinois Railroad
Southern Pacific Transportation Co.
Northwestern Pacific Railroad Co.
Petaluma & Santa Rosa Railroad Co.
The Chesapeake & Ohio Railway Co.
The Baltimore & Ohio Railroad Co.
The Texas & Pacific Railway Co.
Abilene & Southern Railway Co.
Central of Georgia Railroad Co.

Grand Trunk Western Railroad Co.
Union Pacific Railroad Co.
Los Angeles & Salt Lake Railroad Co.
Oregon Short Line Railroad Co.
Oregon-Washington Railroad & Navigation Co.
Illinois Central Gulf Railroad Co.
Chicago, Rock Island & Pacific Railroad Co.
The Atchison, Topeka & Santa Fe Railway Co.
Seaboard Coast Line Railroad Co.
Soo Line Railroad Co.
Lake Superior & Ishpeming Railroad Co.
Maine Central Railroad Co.
El Paso Union Passenger Depot Co.
Duluth, Missabe & Iron Range Railway Co.
Missouri-Kansas-Texas Railroad Co.
Western Pacific Railroad Co.
Quanah, Acme & Pacific Railway Co.
Detroit, Toledo & Ironton Railroad Co.
City of Hillsboro (for Oregon Electric Railway)
The Fort Worth & Denver Railway Co.
Spokane International Railroad
Norfolk Southern Railway Co.
Wellsville Addison & Galeton Railroad Co.
Central Iowa Transportation Cooperative
East Washington Railroad Co.
Warren & Quachita Valley Railway Co.
State of Vermont

NOTICE SECTION

No. AB-36 (Sub-No. 2)

UNION PACIFIC RAILROAD COMPANY-ABANDONMENT PORTION GOSHEN BRANCH BETWEEN FIRTH AND AMMON, IN BINGHAM AND BONNEVILLE COUNTIES, IDAHO

Findings made that the present and future public convenience and necessity permit abandonment of line by Oregon Short Line Railroad and abandonment of operations by Union Pacific Railroad Company of a portion of Oregon Short Line's line extending from milepost 0.06 near Firth in a northeasterly direction to milepost 17.53 near Ammon, a distance of 17.59 miles, subject to republication and certain conditions, by report and order of the Commission, Division 3, Acting as an Appellate Division, dated , which modified, in certain respects, the order of the Commission, Review Board Number 5, dated April 27, 1976, which had made similar findings of present and future convenience and necessity, subject to conditions.

The order of the review board had authorized abandonment, subject to the same conditions for the protection of employees as set forth in *Chicago, B&Q R. Co. Abandonment*, 256 I.C.C. 700 (1944), as supplemented by section 405 of the Rail Passenger Service Act (45 U.S.C. 565) and certain other unrelated conditions. By petition filed March 9, 1977, the applicants requested that only those conditions for the protection of employees set out in *Chicago, B&O R. Co. Abandonment, supra*, be imposed, since section 1a(8) of the Interstate Commerce Act did not require imposition of employee protective conditions established pursuant to section 405 of the Rail Passenger Service Act (RPSA), except in those abandonment proceedings filed subsequent to the Commission's promulgation of new abandonment regulations in Ex Parte No. 274 (Sub-No. 2), *Abandonment of Lines and Discontinuance of Service*, on November 1, 1976.

Initially, the report discussed the amendments of the Interstate Commerce Act (act) enacted in the Rail Revitalization and Regulatory Reform Act of 1976 that related to employee protection. The amendement of section 5(2)(f) of the act and enactment of section 1a(4) relating to employee protection in abandonment proceedings mandate that the arrangements for protection of employees in section 1a and 5 proceedings shall be at least as beneficial to such interests as those established pursuant to section 5(2)(f) of the act and pursuant to section 405 of the RPSA.

The report then outlined the history of employee protection under section 5(2)(f) of the act, and the substantive content of the various arrangements for the protection of employees established pursuant to section 5(2)(f) including the "Oklahoma," "Burlington," and "New Orleans" conditions. Furthermore, an analysis of the arrangements for the protection of employees established pursuant to section 405 of the RPSA, which were approved by the Secretary of Labor on April 17, 1971, was made. It indicated that the level of employee protection contained in this agreement negotiated pursuant to paragraph (a) of section 405 substantially exceeded the level of employee protection established pursuant to section 5(2)(f) in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271. Paragraph (b) of section 405 had established certain minimum requirements for arrangements for the protection of employees to be negotiated pursuant to paragraph (a). These included the proviso that employee protection negotiated pursuant to section 405(a) of the RPSA had to be at least as beneficial to employee interests as the arrangements for the protection of employees established pursuant to section 5(2)(f) of the act, i.e. "New Orleans" conditions. The higher level of employee protection negotiated pursuant to section 405(a) made these requirements in paragraph (b) redundant, since as a statutory minimum, section 5(2)(f) protection is encompassed within the protection enacted in and developed pursuant to section 405 of the RPSA. It stated that imposition of 5(2)(f) conditions combined with or supplemented by any section 405 RPSA protection, as required by the act, is also redundant since the amendment of section 5(2)(f) and the enactment of section 1(a)(4) provided that section 405 and the arrangements for employee protection established pursuant to it to be the all encompassing, minimum level of employee protection to be imposed in section 1a and 5 proceedings.

The second section of the report concerned the imposition of appropriate employee protection in those abandonment applications still pending before the Commission which were filed prior to promulgation of the Commission's new abandonment regulations on November 1, 1976. Section 1a(8) of the act requires the imposition of 1a(4) employee protection (i.e. section 405 of the RPSA and the provisions for protection of employees developed pursuant to it) only in those abandonment proceedings filed subsequent to November 1, 1976. It was found that prior to enactment of the Rail Revitalization and Regulatory Reform Act of 1976, imposition of employee protective in abandonment proceedings was not required by statute, but that imposition of such conditions was within the discretion of the Commission, see *I.C.C.* v. *Railway Labor Executives' Association*, 315 U.S. 373. In the exercise of this discretion the "Burlington" conditions had been imposed in the past. The report concluded that although the employee protection specified in section 1a(4) of the act is not required in abandonment applications filed prior to November 1, 1976, the intent of Congress and a consistent treatment of the employee protection would best be satisfied by the imposition of the employee protective conditions enacted in and developed pursuant to section 405 of the RPSA, in all pending abandonment proceedings, filed prior to November 1, 1976. The report stated that this was clearly within the discretionary power of the Commission as amplified in *I.C.C. v. Railway Labor Executives Association, supra.*

Because this decision represents a significant policy change and interpretation, all other railroads and employee representatives may have an opportunity to intervene and present argument, if they so desire, by submitting written comments to the Interstate Commerce Commission within 15 days of the date of this notice. Since the Commission is providing an opportunity for interested parties to comment on this decision, it will retain jurisdiction in this proceeding and in other subsequently decided abandonment proceedings which were filed prior to November 1, 1976. At the close of the period specified for comments, we will review the comments received and consider the conditions specified in this report in light of such comments. Carriers may consummate abandonments during this period, but if they do so, they will be deemed to have no objection to the employee protective conditions specified in this report. However, if after comments it is determined that other labor protective conditions are more appropriate for employee protection, then in those proceedings not consummated, we will by our retention of jurisdiction, impose such other labor protective conditions.

FINANCE DOCKET NO. 23011

SOUTHERN PACIFIC COMPANY—MERGER—PACIFIC ELECTRIC RAILWAY COMPANY

Decided August 5, 1977

Failure of the Southern Pacific Transportation Company to include the Union Pacific Railroad Company and the Atchison, Topeka and Santa Fe Railway Company in certain through routes at certain reduced rates for various oils other than petroleum, between points in the transcontinental territory, on the one hand, and points in the southwestern and western trunkline territories, on the other hand, granted relief from conditions imposed by the Commission in *Southern Pac. Co., Merger,* 327 I.C.C. 38. Proceeding discontinued.

William P. Higgins, Allan R. Post, Frederick G. Pfrommer, and *Leland E. Butler* for petitioners.

Charles W. Burkett and *John MacDonald Smith* for respondent.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS BROWN, MACFARLAND, AND CHRISTIAN

BY DIVISION 3:

The modified procedure was followed. By joint petition filed on July 28, 1976, the Atchison, Topeka and Santa Fe Railway Company (Santa Fe) and Union Pacific Railroad Company (Union Pacific) seek to have the Southern Pacific Transportation Company, hereinafter called the Southern Pacific or respondent, be required to comply with the traffic conditions imposed in *Southern Pac. Co. Merger,* 327 I.C.C. 38 (the 1964 merger of the Pacific Electric Railway Company, hereinafter called the Pacific Electric, into the Southern Pacific), referred to herein as the merger proceeding, and to rescind certain routing restrictions applicable to reduced rates, initially effective April 15, 1976, on various oils other than petroleum, eastbound and westbound, between points in the transcontinental territory and points in southwestern and western trunkline territories. The routing restrictions were imposed by Southern Pacific to insure maximum long haul, thereby precluding, petitioners claim, participation by Santa Fe and Union Pacific in traffic moving via junctions previously open to them to and from points on the former Pacific Electric.

The involved rate reduction was an outgrowth of an application by a shipper before the Trans-Continental Freight Bureau (TCFB) in which a proposal was made to reduce vegetable oil rates. The proposal was to reduce the tank car rate on vegetable oils from 192 cents per 100 pounds to 160 cents per 100 pounds, minimum 150,000 pounds.[1] Supplements to the application were issued to expand the scope to include related commodities.[2] The rate was to apply generally between Pacific Coast points and midwestern and southwestern points.

While the proposal was pending before the TCFB Executive Committee, Santa Fe and Union Pacific on February 6, 1976, issued independent action instructions to the TCFB to publish the reduced rate for their accounts. The rates were initially published in various items in supplement 95 to TCFB, Tariff 1-X, I.C.C. 1912, for westbound movements, and in various items of supplement 45 to TCFB, Tariff 2-M, I.C.C. 1914, for eastbound movements, effective April 15, 1976. Various amendments were subsequently made to add a number of concurring carriers. Some of the connecting carriers joining in the rate restricted the application to only apply via certain routes and against transit when in connection with their lines. Santa Fe and Union Pacific, however, announced a willingness to join their connections in all normal routing arrangements.

Subsequent to the Union Pacific and Santa Fe announcement, on February 12, 1976, Southern Pacific also announced that it would establish the same 160-cent rate, effective April 15, 1976, but restricted its connections to junctions at Santa Rosa, N. Mex., Ogden, Utah, San Antonio, Tex., and points east of San Antonio. Several connecting carriers also joined Southern Pacific, again with transit and routing restrictions. In effect, Southern Pacific would allow the 160-cent rate to apply only over routes providing it with its longest haul to and from all stations on its line. As a result, the reduced rates do not apply over several preexisting through routes in connection with the Santa Fe and the Union Pacific. The higher 192-cent rate was not canceled at the time the lower rate went into effect, and the higher rate still applies, with normal routing, in those instances where the conditions applicable are not complied with, for instance, when transit is required of those originating carriers who restrict such service to the higher rate.

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[1] Both rates are stated at the Ex Parte 313 level.

[2] The commodities involved include various oils, such as coconut, corn, cottonseed, peanut, palm, and soybean, and other article such as oil foots, sediment and residum, fatty acids, animal grease or tallow, shortening, and other packinghouse products.

Prior to the effective date of the reduced rate, numerous petitions for suspension were filed with the Commission. Many affected shippers who felt that their competitive positions were weakened by the lower rate protested the action of the rail carriers. In addition, Santa Fe and Union Pacific filed petitions for suspension alleging that Southern Pacific had closed existing through routes and channels of trade in violation of section 15(3) of the Interstate Commerce Act, which at many junctions also violated conditions imposed in the merger proceeding. On April 12, 1976, in Suspension Case No. 64531, the Commission's Board of Suspension declined to suspend the lower rate or any of the attendant restrictions. By order of the Commission, Division 2, Acting as an Appellate Division, the decision was affirmed.

The level of the 160-cent rate is not in question; the only question raised is whether the restricted application of that rate by Southern Pacific, to and from points located on the former Pacific Electric line, is in violation of the conditions imposed in the merger proceeding.

In the merger proceeding, an application by Southern Pacific Company and the Pacific Electric, under section 5(2) of the Interstate Commerce Act, as amended, to merge the properties and franchises of the Pacific Electric into the Southern Pacific Company for ownership, management, and operation was approved, subject to employee protective conditions, and the following conditions which are set forth on page 40 of that report:

> 1. Upon consummation of the merger, Southern Pacific Company shall maintain and keep open all routes and channels of trade via existing junctions and gateways unless and until otherwise authorized by the Commission.
>
> 2. The present neutrality of handling traffic inbound and outbound by the Pacific Electric Railway Company shall be continued so as to permit equal opportunity for service to and from all lines reaching the rails of that carrier without discrimination as to routing or movement of traffic and without discrimination in the arrangement of schedules or otherwise.
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> 3. The present traffic and operating relationships existing between the Pacific Electric Railway Company, on the one hand, and all lines connecting with its tracks, on the other, shall be continued insofar as such matters are within the control of the Southern Pacific Company.
>
> 4. Southern Pacific Company shall accept, handle, and deliver all cars inbound and outbound, loaded and empty, without discrimination in promptness or frequency of service as between cars destined to or received from competing carriers, and irrespective of destination or route of movement.

5. Southern Pacific Company shall not do anything to restrain or curtail the right of industries, now located on the Pacific Electric Railway Company, to route traffic over any or all existing routes and gateways.

6. Any party or person having an interest in the subject matter may at any future time make application for such modification of the above conditions, or any of them, as may be required in the public interest, and jurisdiction shall be retained to reopen the proceeding on this Commission's own motion for the same purpose.

Prior to the merger, Pacific Electric had served principally as a feeder line for the Southern Pacific Company in the Los Angeles area since its stock ownership was acquired by the latter carrier in 1911. Southern Pacific Company's control over the Pacific Electric was therefore direct and sole.

At the time of the merger proceeding, there existed points of interchange of freight traffic between Pacific Electric and Santa Fe at Long Beach, Los Angeles Harbor, Los Angeles, and San Bernardino, Calif., with the principal points of interchange being San Bernardino and Los Angeles. Between Pacific Electric and Union Pacific, the interchange points were at Long Beach, Los Angeles, Los Angeles Harbor, Riverside, San Bernardino, and Colton, the principal points of interchange being Colton and Los Angeles. Joint through carload commodity rates on various oils, other than petroleum, eastbound and westbound, were applicable over those routes and interchanges. Subsequent to the merger and prior to Southern Pacific's publication of reduced rates, traffic continued to move over petitioners' lines with interchange at former Pacific Electric points for delivery to stations on the merged line.

During the merger proceeding, the Santa Fe filed a petition for leave to intervene to seek conditions protecting the then existing routings and interchanges between itself and Pacific Electric. Santa Fe and Southern Pacific Company agreed to the imposition of the traffic conditions here at issue. Such conditions are essentially the same as the so-called standard traffic conditions imposed in *Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455.

The petitioners urge that the action of the respondent, in restricting the application of the reduced rates to routes via restrictive gateways which insures Southern Pacific a long haul, has the effect of commercially closing the routes over which the higher rates apply, and that this constitutes a violation of the merger conditions. Petitioners claim that such restrictive routing also restrains or curtails the right of industries located on the former Pacific Electric line to route traffic over any and all existing routes and gateways, also a violation of the conditions, specifically condition number 5. Santa Fe and Union Pacific maintain that the differential of 32 cents per hundredweight between the two rates effectively closes those previously existing through routes and eliminates the California junction gateways to traffic moving over their lines to and from points on the former Pacific Electric.

Petitioners claim that the actions of Southern Pacific are in all material respects identical to those condemned by the Commission in *Enforcement of Conditions in Merger Proceeding,* 313 I.C.C. 191. That case involved a petition seeking to have the Louisville and Nashville Railroad Company comply with traffic conditions identical to those herein by establishing routes via Chattanooga, Tenn., over the lines of the Alabama Great Southern Railroad Company and the Southern Railway from former Nashville, Chattanooga & St. Louis lines in Tennessee to Thomas, Ala., and to apply thereover reduced rates on fine coal which had previously become effective over competing routes. The Louisville & Nashville had refused to establish the rates over the sought routes largely because of a controversy over divisions. The Commission held that the refusal resulted in a commercial closing of routes in violation of the conditions. Petitioners state that the Commission has been consistent in its application of that decision.[3]

The respondent contends that the purpose of traffic conditions such as those imposed in the merger proceeding is to maintain the *status quo* of traffic and operating relationships between connecting lines, on the one hand, and shippers and receivers located on the merged company's lines, on the other, the same as if there had been no merger. Southern Pacific, further states that such conditions were imposed in the merger proceeding to grant Union Pacific and Santa Fe protection against deterioration in their competitive position, but were not meant to grant the competing lines an advantage they did not enjoy prior to the merger.

In this regard, Southern Pacific emphasizes the relationship between Southern Pacific and Pacific Electric, on the one hand, and Union Pacific and Santa Fe, on the other, prior to the merger. Pacific Electric was a unit of the Southern Pacific system, and had been under Southern Pacific's direct supervision and control since its inception in 1911. Even though Pacific Electric was a separate corporate entity, it was a member of the Southern Pacific family, joining in common solicitation and ratemaking efforts. It is claimed that while Pacific Electric generally joined with Union Pacific and Santa Fe in publishing joint rates to and from Pacific Electric points, this was not an invariable practice; whenever a publication, not part of the bureau ratemaking procedure was made, Pacific Electric's participation depended on final approval of Southern Pacific rate officers. In effect, in those instances of rate publication by independent action, Pacific Electric's ratemaking policies reflected those of Southern Pacific. In light of this, respondent contends, the presently disputed rate action is consistent with Pacific Electric's policies prior to the merger.

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[3] Other cases cited by petitioners are *Rates, TOFC, Between Midwest & South—Louisville & N. R.,* 318 I.C.C. 40; *Printed Matter from Philadelphia Port and Sharon Hill,* 318 I.C.C. 191; *Rates, Various Commodities—Canada, Midwest, and East,* 318 I.C.C. 522; I. & S. No. 8746, *Routing, Via Seaboard Coast Line R.R. From or To North Savannah, Ga.* (not printed), decided February 6, 1973; I.&S. No. 9042, *Blackstrap Molasses, Points in Florida To Southern Territory* (not printed), decided February 3, 1976; and I.&S. No. 9064, *Grain Transit Privileges, Quincy, Ill., Burlington Northern, Inc.* (not printed), decided March 25, 1976.

The respondent argues that the circumstances surrounding the rate reduction justify its applying restrictive routing to the lower rate. Southern Pacific points out that the proposal to reduce the rate on edible oils was a controversial one within the rail industry, the dispute centering on whether and in what amount any additional revenue would be generated by the new 160-cent rate. While still under study by the TCFB Executive Committee, the rate was reduced by Santa Fe and Union Pacific by independent action. Respondent claims that this competitive initiative set the rate level because Santa Fe and Union Pacific reach enough of the midwestern territory involved to service some producers of the involved commodities and therefore are in a position to provide single-line service from at least some of the producers in the region to the large market in Los Angeles, Calif. Respondent does not reach the major midwestern oil producers, and must receive this traffic from its origin connections.

Southern Pacific claims that its own rate action was a competitive response to the initiative of petitioners, and was intended to minimize revenue losses. While the reduction in rates to the 160-cent level was adverse to Southern Pacific, the carrier did have many shippers and receivers on its line who would be put in a competitive disadvantage if Southern Pacific did not also lower its rates. Respondent calculates that if it had not made a competitive publication in response to the independent actions of petitioners, it would have lost over $3 million annually on westbound traffic alone. Without the routing restrictions imposed to insure itself a long haul on the traffic, respondent estimates that losses on westbound traffic, based on 1975 traffic and routings, would have exceeded $1 million. Even with routing restrictions, respondent claims the loss would be reduced to slightly over $500,000 annually. Southern Pacific concluded, therefore, that it was necessary to meet the competition, but equally necessary that the reduction in revenue be alleviated by avoidance of further losses to competing lines via short-haul gateways. In effect, Southern Pacific claims it simply countered petitioners rate action with a defensive rate publication to maintain existing competitive balances.

Respondent further avers that the primary goal of petitioners in this proceeding is to apply merger conditions to traffic not covered by the merger conditions. Southern Pacific claims that its volume movements to and from points in the Los Angeles area are not to points on the former Pacific Electric, which account for relatively little traffic, but rather to other points on its line. Southern Pacific contends it is this traffic in which petitioners seek to participate by using the merger conditions in an effort to open up all routes which may otherwise be lawfully restricted. This would presumably be accomplished due to the complexities in tariff publication and routing arrangements which make it difficult to restrict routing to and from points on the Southern Pacific, without at the same time restricting routing to and from points on the former Pacific Electric.

Respondent points to statistics submitted by petitioners indicating that the flow of vegetable oils traffic to former Pacific Electric points via California junctions over petitioners' lines actually increased subsequent to the effective date of the reduced rates. Union Pacific submitted traffic data to support its claim that the routing restrictions substantially injured its operations. Such data shows that to certain named destinations located on the former Pacific Electric, Union Pacific shipped 97 carloads in 1974 via California junctions, 162 carloads in 1975, and 158 carloads for the first 10 months of 1976. Santa Fe submitted no similar movement figures. Respondent claims this demonstrates that the traffic flow over the preexisting routes is undimished, even at the higher 192-cent rate which still applies. This may be attributed to the fact that many origin carriers imposed restrictions, including gateway restrictions and restrictions against transit, when they concurred in petitioners' rate action. When shipments do not qualify for the 160-cent rate, the 192-cent rate applies over all normal routes and gateways. Respondent argues that since the higher rate remains in effect and allows full transit privileges and is applied via established tariff routes which include California junction routing with Union Pacific and Santa Fe, and since traffic movement appears unaffected by the existence of the lower rate, there has been no commercial closing of the California junction routes, and, therefore, the conditions imposed in the merger proceeding have not been violated.

Southern Pacific urges that should the Commission find the disputed rate action to be a technical violation of the merger conditions, the conditions should be modified in the public interest in order to preserve the right of Southern Pacific to exercise independent ratemaking action so that the competitive relationship which existed between Southern Pacific, Union Pacific, and Santa Fe prior to the merger may be maintained. Southern Pacific claims that if maximum competition is to be maintained among the rail carriers serving the Los Angeles area, the right of each to take independent action, as a defensive measure or otherwise, must remain unfettered. Southern Pacific suggests a modification to condition No. 1 which would, it claims, preserve the premerger status quo: when rates are made through exercise of the right of independent action, no set pattern of routings need be required. This supposedly would preserve the relationships existing at the time of the merger, the primary goal of such traffic conditions.

Petitioners reply to respondent's argument that, in effect, conditions imposed in family-line mergers should be construed differently than when totally unrelated carriers merge, by stating that if such were the case the result would be that surviving carriers would be able to construe such conditions always to their own advantage; that the Commission imposes such conditions when they are found to be in the public interest, as was the case in the merger proceeding; that Southern Pacific agreed to the conditions at the time of the merger; that Southern Pacific cannot now ignore the "plain meaning" of the conditions; and that, in any event, in fairness to all interested parties, for the Commission to accept respondent's theory it would have to either reopen all previously decided family-line merger proceedings in which similar conditions were imposed, or alternatively, the Commission should conduct a rulemaking proceeding, embracing all prior line mergers, to determine the factors constituting control and the effect such control has on the construction of previously imposed conditions.

Petitioners reply to Southern Pacific's request to modify the traffic conditions by arguing that respondent has not presented evidence to justify modification, nor is the instant proceeding a proper one for such consideration. A separate proceeding to consider the proposed modification is needed because acceptance of the modification would enable Southern Pacific to eliminate routes and channels of trade via existing junctions and gateways for all commodities, and would curtail and restrain the right of all industries located on the former Pacific Electric line to route traffic over those routes and gateways. Petitioners claim that such action requires full notice to potentially interested parties, and such notice has not been given in the present proceeding.

DISCUSSION AND CONCLUSIONS

The first issue to be resolved in this proceeding is the applicability of the merger conditions to Southern Pacific's action in limiting the reduced rates on the involved commodities to insure its long haul. Southern Pacific forwards two arguments in this regard: (1) that the continuing application of the higher rates to routes over petitioners' lines to and from points on the former Pacific Electric with interchange at California junctions, together with evidence that traffic in fact moves over these routes at levels equal to those reached before the effective date of its independent action, evidences no commercial closing of preexisting routes and gateways, and (2) that, in any event, the merger conditions do not apply to its independent ratemaking powers. We disagree with both contentions.

In the first instance, it is true that some transcontinental traffic continues to move over the petitioners' lines at the higher 192-cent rate. Whenever any of the several originating carriers in the Midwest vegetable oil-producing area places restrictions on the shipments westbound (e.g., transit restrictions), the lower 160-cent rate does not apply. Such restrictions, however, are not imposed in all instances. Where no such restrictions exist, the higher rated routes are not, in effect, desirable open routes for many shippers and receivers. It was the mandate of this Commission in the merger proceeding that Southern Pacific keep open *all* routes and channels of trade via existing junctions and gateways in connection with the former Pacific Electric line. In a number of proceedings, reduced rates similar to the magnitude involved herein, restricted so as not to apply over a competitive route taking higher rates, were found to have the effect of closing the higher rated route. *Carolina, C. & O. Ry. Co. v. Southern Ry. Co.*, 299 I.C.C. 335 (1956); *Phosphate Rock, Florida to Arkansas, Illinois, and South*, 299 I.C.C. 593 (1956). A similar finding is warranted in the proceeding herein.

Southern Pacific's general proposition that the merger conditions are not meant to apply to its independent ratemaking powers is without merit. The language of the conditions is explicit; Southern Pacific is foreclosed from doing anything which will have the effect of closing, commercially or otherwise, any of the routes which existed at the time of the merger, without our authorization. See, *Enforcement of Conditions in Merger Proceeding*, 313 I.C.C. 191, 194 (1961). A unified carrier may not substitute its own judgment for that of the Commission to determine what circumstances justify an action which otherwise violates the conditions imposed in a merger proceeding. Southern Pacific cites no cases, and we find none, in which the Commission has permitted a unified carrier to independently determine that an action which closes previously open routes and gateways, however permissible it may have been prior to a merger, is not meant to be proscribed by conditions in the merger itself. It is the Commission's responsibility to determine whether and under what circumstances a carrier may be relieved from its obligation to abide by merger conditions, not the carrier's. Southern Pacific agreed to the provisions of the conditions as a prerequisite to consummation of the merger and must now abide by them unless otherwise authorized by this Commission. If the unified company had wished to preserve its ability to close routes and gateways to and from points on the former Pacific Electric by right of independent ratemaking action, the merger proceeding itself was a forum in which to pursue such a result. Southern Pacific chose not to do so, and there is nothing in the merger conditions themselves which otherwise implies such right exists.

In this regard, a discussion of merger conditions is in order. The traffic conditions imposed in the merger proceeding are the so-called standard conditions which have been applied in many other merger and control cases. One of the major reasons for the general acceptance of these conditions over the years is their flexibility for change. Jurisdiction is retained by the Commission, giving the right to any party or person having an interest in the subject matter to return to the Commission for such modification of the conditions as may be required in the public interest. Likewise, where permanent modification of the conditions is not required, but yet a merged carrier may desire a particular course of action which effect may be technically violative of the traffic conditions, prior authorization may be obtained from the Commission if the action is shown to be required in the public interest. Therefore, such obligations of the surviving carrier as imposed by the merger conditions are not meant to apply in perpetuity, but only until the public interest otherwise requires. This procedural safety valve is assurance that carriers may continue to provide adequate transportation services to the public while not being unduly bound by formal requisites which may no longer be relevant. However, until such diversion from the dictates of the merger conditions is shown to be justified in the public interest, either on a permanent basis or as required by a particular set of circumstances, in a proper procedure before this Commission, the merged carrier must continue to strictly abide by those dictates. Not without reason are such conditions imposed, and they shall continue to be presumed valid unless proven otherwise.

The question remaining before us, then, is whether and to what extent the evidence of record warrants granting to Southern Pacific present relief from the merger conditions. We conclude, based on the unique set of circumstances in this case, that relief from the conditions is justified in the public interest. We reject, however, Southern Pacific's proposal that the merger conditions be permanently modified in this proceeding.

One of the primary goals in imposing traffic conditions in merger proceedings is to preserve the intramodal competitive balance, to prevent diversion from other connecting railroads in the involved territories. Such diversion potential lies in the enhanced capabilities of the unified system. *Chicago & N. W. Ry. Co.—Merger*, 330 I.C.C. 13, 49 (1967). Southern Pacific's action in restricting routing applicable to the lower 160-cent rate is not a unilateral attempt to grab a share of the market by use of its enhanced capabilities as a unified system, thereby upsetting the competitive balances existing with its connecting carriers. It is, rather, a reasonable response to an initiative by Santa Fe and Union Pacific when they independently published the reduced rate on the involved commodities. Petitioners would have this Commission strictly enforce the merger conditions even in those instances where the unified company publishes a defensive rate publication to meet the competition and designed to minimize actual revenue losses. Merger conditions were never intended to be so mechanically construed. Traffic conditions are not calculated to freeze the flow of traffic into a preexisting pattern or to protect competing and connecting carriers against all possible adverse effects which might follow from the unification and resulting improvements in service by the surviving corporations. *Erie R. Co. Merger*, 312 I.C.C. 185, 191 (1960). Competing carriers cannot expect merger conditions to insulate them from otherwise legitimate market responses when the adverse effects of the competitive response are not reasonably caused by the unified carrier's enhanced capabilities as a unified system. This is especially true where, as here, the action is a response to the complainant's own market initiatives. To so bind the unified company would be to unduly restrict it in its solicitation and routing of traffic and the development of a strong competitive system. Such a result is not in the public interest.

For us to determine the public interest, we must balance the various competing interests involved. It is a fundamental principle that the public interest includes the interest of competing carriers as well as the interest of the general public. The public interest, however, must always be construed in light of the national transportation policy, which in part declares its purpose "to promote safe, adequate, economical, and efficient service in transportation and among the several carriers."[4] Petitioners aver that they have suffered actual harm caused by Southern Pacific's restrictive routing, and that such action harms the shipping public by foreclosing routes via Santa Fe and Union Pacific to the former Pacific Electric. While traffic data submitted by Union Pacific does not support Southern Pacific's contention that there has been no commercial closing of preexisting routes and gateways, the data is evidence that Union Pacific has suffered no substantial harm. There has been no diminution in the amount of traffic carried by Union Pacific via the California gateways destined to named points on the former Pacific Electric line. Santa Fe did not claim any specific traffic loss to and from former Pacific Electric points. In addition, no shippers or receivers located at the former Pacific Electric points protested Southern Pacific's restrictive routing, either prior to the effective date of the reduced rate before the Commission in Suspension Case No. 64531, referred to previously, or in the present proceeding, although such action was open to them; nor did petitioners provide shipper or receiver evidence in either proceeding.

Petitioners urge that the traffic conditions be strictly enforced, without relief therefrom, and cite numerous cases in support of that argument, including *Enforcement of Conditions in Merger Proceeding, supra*. These cases, however, are inapposite since the actions restricting routing therein were unilateral by the unified carriers. Southern Pacific's action herein is not unilateral, but is a reasonable competitive response to the actions taken by petitioners. This Commission has in the past recognized the distinction between the unilateral nature of actions which have the effect of limiting participation by connecting carriers in traffic moving over the unified carrier's lines, and responsive actions meant to meet the competition. See, *Salt Cake from Bessemer City, N.C., to Foley, Fla.*, 298 I.C.C. 544, 546 (1956); *Refrigerants or Dispersant Gases, La. & Ky.*, 353 I.C.C. 796, 803 (1977).

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[4] Act of September 18, 1940, C. 722, Title §1, 54 STAT. 899, 49 U.S.C. preceding §1.

In balancing the competing interests, we find that the public interest requires that Southern Pacific be granted relief from the merger conditions, insofar as the operative facts in this singular proceeding are concerned. We emphasize that such relief from the merger conditions is limited to the circumstances herein and should not be construed as evidencing our lessening resolve to see to it that merger conditions are enforced. Each case has its own requirements, sometimes unique, and any conditions imposed, or any relief granted from the obligations of such conditions, can only be understood through reference to the factual context to which they apply.

Furthermore, we also emphasize that the merger condition requirement whereby routes and channels of trade are to be kept open unless and until authorized by us is clearly one of futurity. See, *Salt Cake from Bessemer City, N.C., to Foley, Fla., supra.* Unified carriers may not close preexisting routes without the issue having first been aired in a proper proceeding, and authority to so close the routes having been granted by this Commission. The proceeding herein was initiated by petition of Santa Fe and Union Pacific after the effective date of the disputed rate action by Southern Pacific. As noted, however, a suspension proceeding was conducted by the Commission prior to the effective date of the lower rate, at which time Santa Fe and Union Pacific posited generally the same arguments alleging violations of the merger conditions as forwarded herein. Affected industries also had an opportunity at that time to protest, but none did. The Commission rejected the petitioners' arguments at the suspension proceeding and declined to suspend Southern Pacific's action at that time. That decision may reasonably have been interpreted by Southern Pacific as granting the required *prior authorization* set forth in the conditions. By way of giving notice, however, we hereby state that the suspension procedure will not in the future satisfy the proper procedural methods by which a unified carrier may seek a prior authorization to close preexisting routes and channels of trade pertinent to merger conditions. In any event, it would be incongruous to now require Southern Pacific to commence a separate proceeding on the issue when it may be properly resolved on the record herein. The procedural rights of all interested parties have been protected, and such resolution in the present proceeding will not prejudice those parties.

We do agree with the petitioners, however, that the present proceeding is not the proper one to pass on the merits of Southern Pacific's proposal that merger condition No. 1 be modified to enable Southern Pacific to publish rates by independent action which restrict the participation of other lines in the same manner and to the same extent as Southern Pacific and Pacific Electric could have provided prior to the merger. Such a modification would go far in changing the conditions as they are now constituted. Proper notice to all potentially interested parties, including those shippers and receivers located on the former Pacific Electric, would have to be made before such a modification can be considered. As it now stands, all interested parties have not been given adequate notice and opportunity to be heard on the proposed modification. Since the procedural requirements cannot be accommodated in the present proceeding, a separate proceeding is required.

We find that failure of the Southern Pacific to include the Union Pacific and the Santa Fe in publishing reduced rates in effect over previously open routes to and from points on the former Pacific Electric line is justified by the evidence of record, and that the public interest requires such action to be relieved from the requirements of the above-mentioned conditions prescribed in the merger proceeding.

An order will be issued discontinuing the proceeding.

DOCKET NO. AB-1 (SUB-NO. 9)

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, ABANDONMENT BETWEEN WREN, IOWA, AND IROQUOIS, SOUTH DAKOTA, IN SIOUX AND PLYMOUTH COUNTIES, IOWA AND UNION, LINCOLN, TURNER, McCOOK, MINER AND KINGSBURY COUNTIES, SOUTH DAKOTA

Decided July 28, 1977

Public convenience and necessity found to permit abandonment of the branch line described above, subject to conditions. Issuance of certificate withheld pending compliance with Public Law 94-210.

Louis T. Duerinck, Stuart F. Gassner, and *Christopher A. Mills* for applicant.

Robert B. Frieberg, John D. Gubbrud, Charles Haughland, R. Van Johnson, Harold E. Mesirow, and *Phillip E. Peterson* for protestants.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS BROWN, MACFARLAND, AND CHRISTIAN

BY DIVISION 3:

Exceptions to the initial decision of the Administrative Law Judge were filed by Keep Our Railroad (KORR), an unincorporated association of communities, merchants, grain elevator operators, and other interested persons on and near the line, and the State of South Dakota (State), to which applicant has replied. While our conclusions are similar to those of the Administrative Law Judge, we believe that additional discussion of certain issues presented in the exceptions by protestants is appropriate.

By application filed January 2, 1973, Chicago and North Western Transportation Company seeks a certificate of public convenience and necessity under section 1(18-20) of the act[1] authorizing the abandonment of a line of railroad extending 155.7 miles between Wren, in Plymouth County, Iowa, and Iroquois, in Kingsbury County, S. Dak.

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[1] The abandonment of lines of railroad is now governed by section 1a of the act pursuant to amendment of the act by enactment of Public Law 94-210, *Railroad Revitalization and Regulatory Reform Act of 1976*. Section 1a provides that pending abandonment proceedings, such as the instant proceeding, shall continue to be governed by the provisions in effect at the time the amendment was enacted.

The application was referred to an Administrative Law Judge and hearings were held at Sioux Falls, S. Dak., on May 21-25, 1973. However, by an order served July 10, 1973, all further hearings in this proceeding were postponed, in order to permit compliance with the decision in *Harlem Valley Transportation Ass'n.* v. *Stafford,* 360 F. Supp. 1057 (S.D.N.Y., 1973), affirmed, 500 F. 2d 328 (2d Cir. 1974). Subsequently, an environmental impact statement was issued by the Commission. Thereafter, further hearings were held in this matter on August 17-27, 1976, and September 28-29, 1976.

INITIAL DECISION

In his initial decision, the Administrative Law Judge granted the application. He determined that rehabilitation costs for the line would be substantial and were not warranted by the traffic potential on the line. He rejected protestants' position that the profitability of the line should be based on only the 3-year period 1973-1975, and instead based such a determination on the 6-year period 1970-75. Further, he concluded that the record did not support a finding that applicant was engaged in a deliberate and calculated attempt to downgrade the line. Lastly, he found that evidence offered by protestants that increased production and exportation of grain nationally failed to establish potential demand for rail service over this particular line. He noted that the record did not demonstrate that it was likely that the railroad would participate significantly in any increase in grain movements.

EXCEPTIONS

In our recent report in *Oregon Short Line R. Co.—Abandonment—Goshen,* 354 I.C.C. 76, we concluded that in all pending abandonment proceedings filed prior to November 1, 1976, the labor protection to be imposed is that enacted in and developed pursuant to section 405 of the Rail Passenger Service. Accordingly, the findings of the Administrative Law Judge will be modified in this respect.

The State excepts to the Administrative Law Judge's inclusion of the years 1970-72 in his evaluation of the line's future potential. The State argues that historical data are only useful in judgments about the future if it is reasonable to anticipate the history will be repeated in the future. The State believes that the period 1973-75 is more representative and more likely to provide an idea of further traffic than the 6-year period utilized by the Administrative Law Judge. This belief is based on changes in the production, marketing and movement of grain, and Government policies regarding grain that resulted in more production and a high level of grain exports. Such changes were, it is urged, reflected in operating profits on the line in 1973 and 1974. These years, the State submits, reflect the future direction of grain production and conditions under which the line will be operated, while the years 1970-72, prior to these major changes, should be rejected as totally irrelevant to the future operation of the line.

Further, the State excepts to the Administrative Law Judge's conclusion that it is the protestants' burden to establish that the involved line is likely to participate in the increased movement projection. The State notes that the carrier has the burden of proof for each element of the case, and, thus, it must show that it will not participate in the increased grain traffic. Applicant, protestants submit, has not met this burden.

Moreover, the State concludes, based on statistical evidence set out in its exceptions, that a correlation exists between grain exports and applicant's carloadings, both on all its lines, and the line involved herein. This is confirmed, it is argued, by the increased traffic in 1973-1974, when there was increased exports of grain. The Administrative Law Judge, the State believes, erred in not concluding that such a relationship exists.

The State urges that the Administrative Law Judge erred in not considering applicant's downgrading of the line in his evaluation of the line's future potential. This downgrading, the State concludes, caused the loss of traffic to other modes, and affected the viability of the line. The State, also, disputes the Administrative Law Judge's conclusion that with normalized maintenance the line would not have been viable even at 1973-74 traffic levels. Such figures are erroneous, it is argued, because the revenues do not reflect the downgrading of service; if applicant had provided required cars revenues would have been substantially higher.

KORR, likewise, urges that the Administrative Law Judge erred in basing his analysis of traffic data on a 6-year period. The Administrative Law Judge's use of pre-1973 data, it is offered, ignores the change in Government policy from one favoring storage, to one favoring export. The years 1973-74 KORR perceives as more relevant to predict future traffic potential on the line. Moreover, KORR also suggests that the Administrative Law Judge erred in shifting the burden of demonstrating the railroad will get a share of this potential traffic. KORR believes the initial decision fails to properly address the injury that will be incurred by shippers on the line from the loss of rail service.

APPLICANT'S REPLY

In reply applicant disputes protestants allegation that the years 1973 and 1974 are an appropriate base for estimating the future traffic potential on the line. Traffic in that period, applicant submits, was due to pent up storage and had nothing to do with production in those years. The likelihood of a recurrence is speculative, applicant suggests.

Moreover, applicant maintains that the State's position does not include pricing considerations which account for grain moving by truck to river ports rather than by rail. Applicant notes that in the past the line has not been a major marketing tool for the movement of grain. Applicant cites that only 1.8 percent of feed grain production in the area served by the line has been transported by rail in the 11-year period 1965-75. Applicant asserts that shippers continue to utilize trucks in the face of 100-percent car supply, taking advantage of returns generated by truck/barge movement. Applicant believes that the conclusion by the State that increased exports will result in an increase in carloadings is purely speculative.

With regards to calculation of losses with normalized maintenance, applicant insists that regardless of the amount of maintenance, no more service could have been provided on the line in 1973 and 1974. The car shortages experienced by the line were only reflective of a general storage caused by the large increase in exports during that period, it is argued.

PROCEDURAL ISSUES

Applicant has moved to strike the statistical data concerning alleged correlations between the export of grain and carloadings offered in the State's exceptions. Applicant submits that this is an attempt to add evidence without an opportunity for cross-examination. In reply the State maintains that the data is derived from applicant's own evidence and is the product of a widely used linear regression technique. The State asserts its use of statistics is simply to comment upon evidence of record.

We agree with applicant that such evidence should be stricken. If statistical data is to be utilized, the opposing party, if due process is to be met, must have an opportunity to cross-examine the person presenting such evidence with regard to the technique used and the validity of the results. Accordingly, applicant's motion should be granted.

DISCUSSION AND CONCLUSIONS

The sole test to be applied in an abandonment proceeding is whether the public convenience and necessity permits the abandonment. *Colorado* v. *United States,* 271 U.S. 153 (1926). In applying this test the Commission must weigh the burden on interstate commerce from operation of the line, with the injuries that may be inflicted upon local communities and interests if the line is abandoned.

The central conflict between the parties in the instant proceeding concerns the future potential of the line. Protestants appear to concede that in the past the line was a burden on interstate commerce, but believe that this history does not reflect the future performance of the involved line. Rather, they argue, the grain exports from the United States in future years will result in a large number of carloads being shipped on the line. Protestants would have us predict future traffic on the line based only on the years 1973-74, disregarding prior years.

We agree with protestants that the issue in an abandonment proceeding is the burden on interstate commerce in the future, not the past. An abandonment cannot be granted simply because the line lost money in the past and was unneeded. The act requires us to find that the future public convenience and necessity permits the abandonment.

Data of past operations are relevant only as a tool to predict the future level of utilization of the line. If a protestant can demonstrate, with specificity, that utilization of the line in the future will be markedly different than in the past, clearly the evidence of operations in the past will be much less persuasive on the issue of future public convenience and necessity. Likewise, if a protestant can present evidence that a particular period in the past is more reflective of future traffic levels than other past years, we might well disregard operations of nonrepresentative years.

Our indication that a protestant should present such evidence does not mean that the burden of demonstrating future public convenience and necessity does not permit abandonment is on the protestant. The burden of proof rests clearly on an applicant seeking a certificate from this Commission. However, a rebuttable presumption arises, to benefit of an applicant, that the past level of operations will be repeated in the future. Protestant's duty is to come forward with some evidence to refute this presumption.

In the instant proceeding, the evidence proffered by protestants does not warrant disregarding evidence of past operations. We agree with the Administrative Law Judge's rejection of 1973 and 1974 as representative years. The evidence indicates that 1973-1974 levels of traffic were in part a result of the movement of grain that was in storage, and were not due solely to grain produced in those years. These movements, during the period of the so-called "Russian grain deal," cannot be utilized alone as a basis for evaluating future traffic levels on the line. A more reliable evaluation is obtained from the 6-year period utilized by the Administrative Law Judge.

Protestants have presented a substantial amount of evidence to demonstrate that grain production and exportation are on the rise in the United States, and that future projections show the increases will continue. From this, protestants wish us to find that potential demand for rail service on the involved line will likewise increase to levels adequate to eliminate applicant's losses. However, we believe such a finding is unwarranted on the record herein.

To make the finding protestants wish, they must translate increased grain production in the area to carloads on the particular line sought to be abandoned. Evidence of rising grain production nationally, as well as the changes in Government policy towards grain, which has resulted in an increase in cultivated acres does not alone permit a finding that the traffic on the line in the future will increase to a level sufficient to cover its cost. The record fails to show any substantial relationship between national grain production and carloadings on this particular line. That increased traffic levels will result in the future is simply speculation without a sufficient basis in the record. Moreover, protestants have not articulated with any precision how many more carloads will be tendered. Such evidence is of consequence since the increases must lift the burden on interstate commerce caused by the line.

The State proposes a 2-year trial period under "normal conditions" to demonstrate that the line can be operated profitably. The State suggests the cost would be minimal. We do not believe it in the public interest to require applicant to risk its funds on such an experiment, when, as herein, the evidence supports a finding that the present and future public convenience and necessity permits the abandonment.

However, we direct the State's attention to the provisions in our order concerning financial assistance to enable the rail service to be continued. By utilization of this procedure, the State's hypothesis can be tested without imposing an undue burden upon applicant and interstate commerce.

We have considered all other arguments presented by protestants and have found they were properly disposed of by the Administrative Law Judge and do not require further discussion.

The parties are advised that this decision is administratively final under the provisions of section 17(9)(c) of the Interstate Commerce Act. Any further administrative appeal can be entertained only under section 17(9)(d) of the act which permits such an appeal only if the entire Commission finds that a matter of general transportation importance is involved, that clear and convincing new evidence has been presented, or that there exist changed circumstances which would materially affect the decision made herein. Such an appeal must be filed within 20 days of the date of service of this report.

We find that, subject to the labor protection enacted in and developed pursuant to section 405 of the Rail Passenger Service Act, the present and future public convenience and necessity permit abandonment by the Chicago and North Western Transportation Company of a portion of its branch line between Wren, Iowa, and Iroquois, S. Dak., as hereinbefore stated, a distance 155.7 miles.

An appropriate order will be entered.

DOCKET NO. AB-1 (SUB-NO. 53)

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY ABANDONMENT BETWEEN BANCROFT AND LEDYARD, IN KOSSUTH COUNTY, IOWA

Decided September 30, 1977

On reconsideration, present and future public convenience and necessity found to permit abandonment by Chicago and North Western Transportation Company of the line of railroad between Bancroft and Ledyard in Kossuth County, Iowa.

Louis T. Duerinck and *Christopher A. Mills* for applicant.

REPORT OF THE COMMISSION

DIVISION 3, ACTING AS AN APPELLATE DIVISION, COMMISSIONERS BROWN, MACFARLAND, AND CHRISTIAN

BY DIVISION 3:

By report and order served February 22, 1977, Review Board Number 5 denied the application of Chicago and North Western Transportation Company (C&NW) for a certificate of public convenience and necessity permitting abandonment of its line of railroad between Bancroft and Ledyard, a distance of 9.4 miles, in Kossuth County, Iowa. Applicant filed a petition for reconsideration of the review board's decision and by order of the Commission, Division 3, dated July 3, 1977, the petition was granted to the extent it requested authority to update the record as to the volume of traffic originating and terminating on the subject line. In response to this order, applicant filed a supplemental verified statement. Protestant Terra Western Corporation (Terra Western) submitted a verified statement in reply and the Transportation Regulation Board of the Iowa Department of Transportation (Iowa Board), by letter dated August 2, 1977, readopted the prior arguments presented in its initial reply to the applicant's petition for reconsideration. Another protestant, the Farmers Cooperative Co. of Ledyard, Iowa (Farmers Co-op) withdrew its protest by letter dated April 12, 1977. Our conclusions differ from those of the review board.

Except as noted, we adopt the facts as set forth in the review board's report and order and only repeat such facts as are necessary for purposes of clarity.

C&NW filed its short form application in the instant proceeding on August 27, 1975, pursuant to the Commission's "Special Rules for Railroads Proposing Abandonments Where the Requirements of Public Convenience and Necessity are Minimal or Nonexistent," subpart B of 49 CFR 1121, which were then in effect. The application was governed by section 1(18) of the Interstate Commerce Act (act), rather than new section 1(a), since it was filed prior to the enactment of Public Law 94-210, the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act). Protests to the proposed abandonment were filed by Terra Western, Farmers Co-op, and Iowa Board, as well as the Railway Labor Executives Association (RLEA), and the proceeding was set for consideration under modified procedure by order served April 30, 1976.

In support of its application, C&NW relied on evidence submitted by the verified statements of M. S. Reid, Assistant Chief Engineer—Administration of C&NW, D. B. Carlisle, Division Manager of C&NW's Central Division, George W. Carroll, Director of Special Studies for C&NW, and H. J. Brugenhemke, Market Manager-Grain. In summary, the evidence showed that the subject line is in poor condition, requiring an expenditure of $56,950 for the next 2 years to rehabilitate it into compliance with the Federal Railroad Administration's (FRA) minimum class I track safety standards; that C&NW has no prospects of recouping these expenditures based on the low volume of traffic presently handled on the line; that Terra Western, one of the two shippers served by the line, has alternate means of rail service available to it at nearby centers; that Farmers Co-op, the other shipper, has recently joined the Big Six Cooperative at Burt, Iowa and can utilize its facilities there to transport grain shipments; that the total traffic handled on the line amounted to 3.2, 6.4, and 4.1 carloads per mile in 1973, 1974, and 1975, respectively; and that C&NW in 1975 had a working capital deficit of $19,365,000 and a net railway operating deficit of $4,506,000.

Among the protests to the application, William O. Cook filed a verified statement in behalf of Terra Western. By his statement, Mr. Cook indicates that the projected annual increase in transportation costs that it would incur as a result of the loss of direct rail service would amount to $25,849, or an average increase of $13.43 per ton.

He further argues that Terra Western would not be able to continue its practice of storing anhydrous ammonia in tank cars on storage tracks during the short peak fertilizer application season, resulting in either lost sales or a $20,000 expenditure for installation of an individual storage facility.

Attached to the protest of the Iowa Board were verified statements by Vernon DeWeerdt, Railroad Assistance Coordinator, Railroad Division, and Ralph L. Pilger, Rail Safety Inspector, Railroad Division. Mr. DeWeerdt asserts that the tracks are in better condition than indicated in C&NW's exhibits; that the line is in fair condition; that C&NW has significantly overstated the number of ties to be replaced, and that the substantial weed overgrowth is the result of C&NW's violation of the duty imposed upon it by Iowa State law to control weed growth. The statements of Mr. Pilger reiterate the statements submitted by Mr. DeWeerdt.

In its report and order, Review Board Number 5 found that C&NW had not borne its burden of proof in establishing "that the burden of maintaining the line outweighs the benefit to the public of continued service;" that C&NW failed to submit evidence of the financial results of its current operations on the line; and that, accordingly, the presumption created by the "34 car rule" under 49 CFR 1121.23 has been rebutted, particularly by the evidence of Terra Western.

On reconsideration, C&NW argues that a rail carrier's only obligation in a section 1(18) abandonment proceeding is to establish that the line proposed to be abandoned is a burden on interstate commerce, and contends that the evidence of record establishes that the Bancroft-Ledyard line is indeed a burden on interstate commerce. In its supplemental verified statement, and the verified statement of George W. Carroll attached thereto, C&NW asserts that recurring traffic originating and terminating on the line amounted to 433 carloads, with the Farmers Co-op responsible for 403 of these carloads, in 1973; 758 carloads, with the Farmers Co-op responsible for 698 of these carloads, in 1974; 779 carloads, with the Farmers Co-op responsible for 740 of these carload in 1975; 67 carloads, with the Farmers Co-op responsible for 28 of these carloads, in 1976; and 8 carloads, with the Farmers Co-op responsible for 2 of these carloads, during the first 6 months of 1977. These figures show that the Bancroft-Ledyard line handled a total of 7.13 carloads per mile in 1976 and less than 1 carload per mile in the first 6 months of 1977. C&NW further states that the Farmers Co-op has confirmed that it has ceased using the Bancroft-

Ledyard line for grain shipments and that it will not be using the line for shipping grain in the future.

William O. Cook has submitted a supplemental verified statement on behalf of protestant Terra Western. Mr. Cook asserts that of the shipments shown on C&NW's supplemental verified statement, Terra Western was responsible for 36 shipments in 1976 and 5 shipments through June 30, 1977; that the cars received during 1976 was indicative of its annual movement; that Terra Western's car movements for 1973, 1974, and 1975 were 29, 49, and 19, respectively; and that the 5 cars received through June 30, 1977, are not representative of one-half of Terra Western's annual movements since a majority of Ledyard's fertilizer cars are received in the fall months. Mr. Cook further states that a loss of rail service would increase Terra Western's average cost of transportation by $13 per ton plus create problems in supplying fertilizer on a timely basis because of the inability to have such a product sitting on track in anticipation of the short fertilizer season.

By letter received August 7, 1977, protestant Iowa Board indicates that it readopts its prior arguments presented in its initial verified statement and its reply to C&NW's petition for reconsideration. Basically, the Iowa Board asserts that C&NW has not submitted financial data to show that the subject line is unprofitable and a burden on the entire railroad.

Discussion and Conclusions

The central issue in this proceeding is the question of whether the line is a burden on interstate commerce. As applicant has pointed out, a rail carrier's only obligation in an abandonment proceeding governed by section 1(18) of the Interstate Commerce Act is to establish that the line proposed to be abandoned is a burden on interstate commerce. If all of the evidence submitted by all of the parties demonstrates that the burden outweighs local need for continuation of the line, the carrier is entitled to a certificate permitting abandonment. *Colorado* v. *United States*, 271 U.S. 153 (1926).

Basing its decision on the record as it existed at that time, the review board found "that C&NW has failed to submit evidence of the financial results of its current operations on the line; that, therefore, the Commission cannot measure the burden on the carrier of continued operations or compare that burden (if any) to the public need for service." As we have previously indicated, C&NW has updated the record concerning the volume of traffic handled by the line. Moreover, the Farmers Co-op, a substantial shipper on the line, has withdrawn its protest to the instant application as of April 12, 1977.

Despite the absence of data as to the actual profitability of this Bancroft-Ledyard line during recent years, the evidence of the present record firmly establishes that this line imposes an undue burden on interstate commerce. Expenditures required for rehabilitation of the line must be considered in determining whether continued operation thereof imposes an undue burden. See *Purcell* v. *United States*, 315 U.S. 381 (1942). There is little doubt that the line is in poor physical condition and will cost an estimated $56,950 to repair. C&NW has supplied photographs to show that the line is in serious disrepair and no protestant has questioned the validity of these photos. In addition, the statistics submitted by C&NW in its supplemental verified statement amply demonstrates that the traffic on the line is not adequate to justify the increased maintenance required for compliance with FRA standards and continued safe operation of the line. With the extremely low volume of traffic presently handled on the line, it is impossible for the line to generate sufficient revenues to enable C&NW to recover the $56,950 needed for immediate maintenance costs. If there is not some prospect of recouping the rehabilitation expenditure, such expenditure should not be made. See *e.g., Chicago and North Western Transp. Co.—Abandonment*, 348 I.C.C. 445 (1976).

The present record indicates that the prospects for increased rail traffic do not exist, let alone form a basis for justification of the necessary increased maintenance costs. By statement of its president, Soren Pedersen, the Farmers Co-op of Ledyard has ceased using the Bancroft-Ledyard line to ship its grain. Rather, it is cheaper for the Farmers Co-op to ship from Burt, Iowa through the Big Six Co-op facility there via reduced volume incentive rates. Without the traffic which has been proffered by the Farmers Co-op, traditionally responsible for 25 to 65 per cent of the total traffic handled by the Bancroft-Ledyard line, continued operation of the line would result in even greater losses for C&NW.

In many abandonment proceedings, the Commission has found that shippers are likely to incur inconvenience and increased transportation costs as a result of the proposed abandonment. However, these are not sufficient to outweigh the detriment to the public interest of continued operations of uneconomic and excess facilities. See *Illinois Term. R. Co. Abandonment*, 312 I.C.C. 607

(1961); *Penn Central Transp. Co.—Abandonment*, 342 I.C.C. 139 (1972); *Chicago and North Western Transp. Co.—Abandonment*, 354 I.C.C. 1 (1977). This is especially the case where alternate means of transportation are readily available.

The evidence submitted by Terra Western demonstrates a preference for rail service rather than a need characteristic of such a shipper relying upon such service for successful operations. Although Terra Western indicates that it will have increased costs in utilizing alternate means of transportation, no evidence has been submitted to indicate whether this cost results in a loss to Terra Western's operations or merely a reduction in profits. Furthermore, Terra Western has the Rock Island Railroad which is 7.8 miles away from Ledyard, Iowa, as well as motor carrier service, at its disposal.

An additional factor not considered by the review board is the marginal financial condition of C&NW. The Commission has recognized this problem in many recent abandonment proceedings involving C&NW. See *Chicago and North Western Transp. Co.—Abandonment*, 348 I.C.C. 635 (1976); *Chicago and North Western Transp. Co.—Abandonment*, 348 I.C.C. 708 (1976). The evidence submitted by C&NW shows excesses of current liabilities over current assets of more than $19 million as of December 31, 1975. C&NW had a net operating income deficit of $14,500,000 in 1975. To compel C&NW to operate a line on which traffic is slight and maintenance costs exorbitant would only contribute to its financial difficulties.

Considering the extent of the whole traffic and the unlikely prospects for increased rail traffic in the future, the slight degree of dependence of the commodities directly affected upon the particular means of transportation involved herein, the marginal financial condition of the C&NW system, the poor condition of the track, and other attendant conditions, we do not believe that applicant should be required to continue to bear the loss necessarily entailed by operation of this line. Subject to the same conditions for the protection of employees as set forth in section 405 of The Rail Passenger Service Act, 45 U.S.C. 565 (see *Oregon Short Line R. Co.—Abandonment—Goshen*, 354 I.C.C. 76 (1977)), we find that the present and future public convenience and necessity permit abandonment by the Chicago and North Western Transportation Company of its line of railroad beginning at milepost 148.5 in Bancroft, and extending in a northerly direction to milepost 157.9 in Ledyard, a distance of 9.4 miles, all in Kossuth County, Iowa.

We further find that an Environmental Threshold Assessment Survey has been prepared by this Commission and made available for public inspection upon request; that such survey has found that no significant impact on the environment would result from approval of the application; that, by order of the Commission, Commissioner Brown, served February 18, 1976, it was determined that, based on the aforesaid Threshold Assessment Survey, no environmental impact statement need be issued in this proceeding as it does not represent a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969; that appropriate notice of such determination has been published as directed by this Commission; that said Threshold Assessment Survey is a part of the record in this proceeding and has been weighed in considering the issues herein; and that the environmental factors here are not such as to require denial of this application.

An appropriate order shall be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, Acting as an Appellate Division, held at its office in Washington, D.C., on the 30th day of September 1977.

No. AB-1 (Sub-No. 53)

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—ABANDONMENT BETWEEN BANCROFT AND LEDYARD, IN KOSSUTH COUNTY, IOWA

We have considered the record in the above-entitled proceeding including the report and order of Review Board Number 5, served February 22, 1977, which denied the application; the petition for reconsideration filed by applicant; the order of the Commission, Division 3, served July 7, 1977, which granted the petition only to the extent of updating the record; the supplemental verified statements, filed by applicant and protestants thereto; and the said division, on this date having filed a report containing its findings of fact and conclusions of law which report is hereby referred to and made a part hereof.

Continued operation of the line would impose an undue and unnecessary burden on the applicant and upon interstate commerce.

We find:

1. That, subject to the conditions for the protection of employees, as set forth in the report, the present and future public convenience and necessity permit the abandonment by Chicago and North Western Transportation Company of its line of railroad between Bancroft and Ledyard, a total distance of approximately 9.4 miles, all within Kossuth County, Iowa, as described in the report.

It is ordered:

1. That in the event any person or Government entity is considering an offer of financial assistance to enable the rail service involved to be continued, then such person or Government entity should promptly given notice that it is considering such an offer by certified mail to carrier applicant and by first-class mail to all parties of record and the Commission;

2. That applicant railroad shall, within 10 days after receiving notice that an offer of financial assistance is being considered, make available to the party considering the offer of financial assistance the information described under the heading "Railroads Seeking Abandonments Authority," which appears in the attached notice of the Commission entitled "Procedures for Pending Rail Abandonment Cases," served March 31, 1976, and published on that date in the *Federal Register*, 41 F.R. 13691 (hereinafter called the Procedures), and such information shall be made available in the manner described in the Procedures;

3. That upon this order becoming administratively final, notice of the finding of public convenience and necessity made herein shall be published in the *Federal Register* pursuant to the requirements of section 1a(6)(a) of the Interstate Commerce Act, as amended;

4. That, notwithstanding any notice that financial assistance is being considered that may have been given pursuant to the above ordering paragraph, any person or Government entity desiring to offer financial assistance to enable the rail service involved to be continued shall, within 15 days of publication in the *Federal Register* of the above-described finding of public convenience and necessity, send notification of such offer by certified mail to applicant railroad and the Commission and by first-class mail to all parties of record, and such notification shall include the terms and information described under the heading, "Persons Offering Rail Service Assistance," which appears in the Procedures;

5. That if the Commission finds that a financially responsible person has offered financial assistance in accordance with the Procedures, the Commission shall postpone the issuance of a certificate of abandonment for such reasonable time, not to exceed 6 months, as is necessary to enable such person or Government entity to enter into a binding agreement with the applicant railroad to provide financial assistance for continued rail service or to purchase the rail line;

6. That when the Commission is informed of the execution of any financial assistance agreement or acquisition and operating agreement, the issuance of the certificate of abandonment shall be postponed for such period of time as such an agreement (including any extensions or modifications) is in effect;

7. That all correspondence to the Commission with respect to offers of financial assistance for the continued operations or acquisitions of the subject line shall contain an appropriate reference to the subject proceeding and that on the lower left-hand corner of envelopes containing such correspondence the following notation shall be typed in boldface "Section of Finance AB-RSCP,"

8. That subject to the conditions set forth above, an appropriate certificate of abandonment shall be issued, and the applicant shall not effect any abandonment or discontinuance of service prior to the effective date of such certificate of abandonment.

9. That this order shall be effective 20 days from the date of service.

EX PARTE NO. 274 (SUB-NO. 2)

ABANDONMENT OF RAILROAD LINES AND DISCONTINUANCE OF SERVICE

Decided November 5, 1976

Regulations to implement section 1a of the Interstate Commerce Act, relating to the abandonment of rail lines and the discontinuance of rail service, adopted.

Constance L. Abrams, Donald T. Bliss, and *William A. Kutzke* for the United States Department of Transportation.

Winifred Sheridan Smallwood for the Florida Department of Transportation.

Robert S. Steiner for the Transportation Regulation Board of the Iowa Department of Transportation.

David A. Wagner for the Maryland Department of Transportation.

John G. Brawley for the Missouri Department of Transportation.

Raymond T. Schuler for the New York Department of Transportation.

Robert P. Kane and *Gordon P. MacDougall* for the Commonwealth of Pennsylvania.

Louis J. Carter and *Charles J. Sludden* for the Pennsylvania Public Utilities Commission.

Joe Norton and *John D. Therrien* for the South Dakota Department of Transportation and Public Utilities Commission.

Harry J. Breithaupt, Jr., James I. Collier, Jr., Neill W. McArthur, Jr., Michael E. Roper, Daniel J. Sweeney, and *William A. Thie* for individual railroads and a railroad association.

Louis J. Carter, William G. Mahoney, and *Charles J. Sludden* for railroad labor organizations.

Barbara M. Adams, William R. Allen, Jr., C. W. Bath, Don A. Boyd, John M. Cleary, John F. Donelan, J. Donald Durand, Donald A. Frederick, Robert L. Graves, Donald E. Graham, Vernon J. Haan, James S. Krzyminski, Bayard Marin, John K. Maser III, Thomas E. MacFarland, Jr., George J. McCusker, William R. Rubbert, Harold E. Spencer, Henrik Stafseth, and *Frederick L. Wood* for shippers and other interested parties.

REPORT OF THE COMMISSION

BY THE COMMISSION:

This proceeding was instituted on July 30, 1976, by the service and publication in the Federal Register (41 F.R. 31878) of a notice of proposed rulemaking and accompanying draft regulations governing the filing and processing of applications to abandon or discontinue rail services. The public was given the opportunity to participate through the submission of written initial and reply statements.[1]

BACKGROUND

In our notice, we announced that we had under consideration significant revisions to part 1121 of Title 49 of the Code of Federal Regulations which contains our regulations relating to the abandonment and discontinuance of rail service. Changes in these regulations were made necessary by the enactment, on February 5, 1976, of Public Law 94-210, the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4R Act).

The new legislation made major revisions in the provisions of the Interstate Commerce Act (the act) affecting the abandonment of rail lines and the discontinuance of rail service. Prior to the enactment of these amendments, the statutory provisions governing the construction or extension of rail lines and those governing the abandonment or discontinuance of rail service were intermingled in paragraphs 1(18) through (22) of the act. Section 801 of the 4R Act reenacted those provisions of the act governing the construction and extension of rail service and consolidated them in an amended paragraph 1(18). Paragraphs 1(19) through (22) were repealed, and sections 802 and 809 of the 4R Act consolidated the provisions relating to the discontinuance and abandonment of rail service in a new section 1a of the act.[2]

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[1] The participating parties were: the United States Department of Transportation, the Florida Department of Transportation, the Transportation Regulation Board of the Iowa Department of Transportation, the Maryland Department of Transportation, the Missouri Department of Transportation, the New York Department of Transportation, the Commonwealth of Pennsylvania, the South Dakota Department of Transportation, the Pennsylvania Public Utilities Commission and the Pennsylvania State Legislative Board of the United Transportation Union (jointly), the Railway Labor Executives' Association and the Brotherhood of Railway and Airline Clerks (jointly), the Association of American Railroads, the Green Bay and Western Railroad Company, the Missouri-Kansas-Texas Railroad Company, the Seaboard Coastline Railroad Company, the Association of Oil Pipelines, Coopers & Lybrand, E. I. DuPont de Nemours and Company, Farmland Industries, Inc., FS Services, Inc., and International Minerals and Chemical Corporation (jointly), Land O'Lakes Agricultural Services, the National Council of Farmer Cooperatives, the National Industrial Traffic League, the Railroad Task Force for the Northeast Region, Inc., Union Equity Co-Operative Exchange, and the Western Region of the National Conference of State Railway Officials.

The 4R Act changes the abandonment and discontinuance provisions in three principal respects. First, section 303, which amends section 17 of the act, requires that abandonment applications be processed to conclusion by the Commission within certain rigid time limits. Second, it greatly expands and changes the type of public notice which is required to be given by a railroad proposing to abandon a line or discontinue service. Third, it provides an opportunity for persons wishing to preserve a line, with respect to which the Commission has found that the public convenience and necessity permit abandonment or discontinuance, to offer financial assistance to the railroad, and it provides that the Commission must defer the issuance of a certificate authorizing abandonment or discontinuance to permit negotiation of a financial assistance agreement.

The formulation and adoption of regulations to implement the new abandonment and discontinuance provisions has been complicated by the statutory division between the Commission and its Rail Services Planning Office (RSPO) of the authority to establish certain standards to be used in evaluating abandonment and discontinuance applications and in computing financial assistance. RSPO is given the statutory responsibility, in section 309 of the 4R Act, for defining "avoidable costs of providing rail service" over a line of railroad which is subject to abandonment. RSPO is not, however, given the specific responsibility for establishing standards for determining revenues attributable to the line, as that term is used in section 1a of the act, and the Commission is required to determire reasonable return on the value of rail properties. The Commission and RSPO, therefore, instituted this proceeding on a joint basis so that all three of these terms could be concurrently defined. Thus, a single set of standards will be available for use by the Commission and the public to determine the costs and revenues of the line to be abandoned or the service to be discontinued and the amount of financial assistance which would have to be offered to assure continuation of rail services which might otherwise be abandoned or discontinued.

The draft regulations which accompanied our notice of proposed rulemaking were voluminous, and they are not being reproduced in full as part of this report. Pertinent portions of the proposed regulations are set out in the text of the report, however, where this is necessary to understand our discussion of the positions of the parties and any changes which we have deemed necessary.

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[2] Further amendments of new section 1a, effected by section 218 of Public Law 94-555, the Rail Transportation Improvement Act, enacted October 19, 1976, will be discussed below.

GENERAL

The proposed regulations were divided into four subparts. Subpart A contained a general statement of purpose and a number of definitions. Subpart B dealt with the requirement of section 1a(5) of the act that each railroad publish a diagram of its system showing lines "potentially subject to abandonment." Subpart C contained procedures to be followed in the filing of abandonment applications, in making offers of financial assistance looking toward the continuation of service over lines that would otherwise be abandoned, and the conversion of abandoned rail properties to other public uses. Subpart D contained standards for determining the revenues attributable to, the avoidable costs of providing service over, and the reasonable return on the value of rail lines subject to abandonment proposals. The regulations being adopted follow the same basic format as those proposed.

The regulations promulgated in this proceeding are basically procedural in nature. They are designed to implement the abandonment and discontinuance procedures mandated by the Congress, but they cannot anticipate and resolve the myriad substantive issues that arise in individual abandonment cases. Questions of *de facto* abandonment, deliberate downgrading of service, and unlawful embargoes can only be dealt with in the context of abandonment applications as they come before the Commission. To the extent that the comments of the parties address issues such as these, they will not be further considered.

In addition to seeking comment on the proposed regulations themselves, the Commission invited interested parties to express their views on three matters not specifically covered in the proposed rules.

The 34-carload rule.—The Commission's present regulations governing abandonment applications, 49 CFR §1121.23, provide for a rebuttable presumption to the effect that if fewer than 34 carloads of freight per mile were carried over a line for which abandonment authority is sought during the 12-month period preceding the filing of the abandonment application, abandonment of the line would be consistent with the public convenience and necessity.

In the notice of proposed rulemaking in this proceeding, we noted that we did not intend to incorporate the 34-carload rule into the new regulations, but that we were considering retaining it as one "evidentiary benchmark" in our evaluation of abandonment and discontinuance applications. Public comment was requested on the continued use of the 34-carload rule.

The parties commenting on this issue overwhelmingly favor the complete repudiation of the 34-carload rule. Many of them argue that the Congress, in requiring the Commission to define precisely the costs and revenues attributable to rail lines which are the subject of abandonment applications, and by requiring RSPO to establish branch-line accounting standards, in effect directed that the 34-carload presumption be abandoned. Upon further reflection, we believe that, in view of the cost and revenue standards being adopted here, there is no longer any necessity to rely on the 34-carload rule. It will not, therefore, be retained for any purpose.

The spur-track exemption.—Former section 1(22) of the act contained an exemption from our abandonment jurisdiction for spur, industrial, team, switching, and side tracks. This exemption was omitted from section 1a as enacted by the 4R Act, and we had reason to believe that this omission was inadvertent. We sought public comment on this matter.

This question has been resolved by the enactment, on October 19, 1976, of Public Law 94-555, the Rail Transportation Improvement Act. Section 218(a) of that statute amends section 1a(1) of the act by adding the following new sentence: "The authority granted to the Commission under this section shall not apply to (a) abandonment or discontinuance with respect to spur, industrial, team, switching, or side tracks if such tracks are located entirely within one State, or (b) any street, suburban, or interurban electric railway which is not operated as part of a general system of rail transportation."

Labor protective conditions.—Section 1a(4) of the act requires that the Commission, in authorizing an abandonment, provide for the protection of the interests of railroad employees, and that the protective provisions be at least as beneficial as those established pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. §565). Assuming that this new requirement might mean some modification in the type of labor-protective conditions now imposed in certificates of abandonment, we suggested in our notice of proposed rulemaking that it might be appropriate to develop such protective conditions in this proceeding rather than later on a case-by-case basis.

The principal spokesmen for railway labor participating in this proceeding—the Railway Labor Executives' Association (RLEA) and the Brotherhood of Railway and Airline Clerks (BRAC) do not favor this approach, and the divergent views of the other parties to this proceeding have convinced us that it would not be possible to develop appropriate employee protective conditions on this record. They will be imposed, with the benefit of a more complete record, on a case-by-case basis as we consider individual abandonment proceedings arising in the future.

THE REGULATIONS

Our discussion of the regulations as proposed and as adopted, and of the public comments respecting them, will be limited to those provisions of the regulations which have either been challenged by one of the parties or which have been determined, on our own initiative, to require some modification or clarification. The regulations adopted reflect a number of modifications of an editorial or noncontroversial nature which are not specifically discussed in this report.

SUBPART A—GENERAL

Section 1121.11(c).—As proposed, this paragraph read as follows:

> (c) "Base year" means the calendar year immediately preceding the year in which the abandonment or discontinuance application is filed with the Commission or any later 12-month period for which data has been collected at the branch level as prescribed in section 1121.40(b).

The United States Department of Transportation (DOT) believes that a more appropriate reporting period would be the latest 12-month period which concludes no later than 3 months prior to the filing of the abandonment application. It contends that the carriers collect these data daily or monthly, and that allowing 3 months for their processing would not be burdensome. The Association of American Railroads (AAR) does not object to the substance of the DOT proposal, but believes that 3 months would be too short of a period to summarize relevant data, and urges a period ending no later than 6 months prior to the filing of the application.

We believe that the use of the calendar year immediately preceding the filing date could, in some instances, result in a record containing information that could be outdated when it was filed, and favor the use of the latest 12-month period for which data has been collected. We further agree with AAR that a filing period ending no later than 3 months from filing might create hardships in submitting such data, and that the latest 12-month period should end no later than 6 months prior to filing of the abandonment or discontinuance application. Section 1121.11(c) will, therefore, be amended to read:

(c) "Base year" means the latest 12-month period, ending no later than six months prior to the filing of the abandonment or discontinuance application, for which data has been collected at the branch level as prescribed in section 1121.40(b).

Section 1121.11(m).—This paragraph contains the definition of the term "significant user" and implements one of the key concepts of the public notice provisions of the new abandonment procedures. Section 1a(2) of the act requires actual notice of an abandonment proposal to be served by the applicant upon those who have made "significant use" of the line in question. The term "significant user" was defined as follows in the proposed regulations:

(m) "Significant user" means any shipper which, during the 12-month period preceding the month the abandonment or discontinuance is filed, originated and/or received either (1) 10 percent or more of the carloads or (2) 50 or more carloads on the line proposed for abandonment or discontinuance.

As pointed out by many parties, including the New York Department of Transportation (New York), the National Industrial Traffic League (NITL), the Pennsylvania Public Utilities Commission and the Pennsylvania State Legislative Board of the United Transportation Union (Pennsylvania PUC and UTU), this definition of "significant user" could, in certain circumstances, result in some very substantial users of rail service not receiving direct advance notice of the filing of an abandonment application. For example, where a line generated 500 carloads in a 12-month period, and where there were 12 patrons on the line each generating 40 carloads, none of them would be a "significant user" entitled to notice of the application. We will amend this definition to read as follows:

(m) "Significant user" means (1) each of the 10 rail patrons which originated and/or received the largest number of carloads (or each patron if there are less than 10), and (2) any other rail patron which originated and/or received 50 or more carloads, on the line proposed for abandonment or discontinuance, during the 12-month period preceding the month in which notice is given of the abandonment or discontinuance application.

SUBPART B—SYSTEM DIAGRAM

Section 1a(5) of the act requires each carrier to file with the Commission, and to publish, a full and complete diagram of its rail system, identifying each line which is "potentially subject to abandonment" as that term is defined by the Commission. The regulations proposed under subpart B to implement this requirement have given rise to substantial public comment in only two respects: the definition of lines which are "potentially subject to abandonment" contained in section 1121.20(b)(1) and (2); and the requirements governing the publication and amendment of the system diagram contained in sections 1121.22 and 1121.23.

Lines potentially subject to abandonment.—The text of section 1121.20(b)(1) and (2) of the proposed rules was as follows:

> (b) All lines in each carrier's rail system shall be separated into the following categories:
>
> (1) All lines or portions of lines which the carrier believes to be potentially subject to abandonment because the carrier anticipates an abandonment or discontinuance application will be filed within the 3-year period following the date upon which the diagram, or any amended diagram, is filed with the Commission;
>
> (2) All lines or portions of lines which may become potentially subject to abandonment because, in the carrier's best judgment, the cost of performing rail service exceeded the revenues from performance of that service by 20 percent or more during each of the two most recent 12-month accounting periods preceding the date upon which the diagram, or any amended diagram, is filed with the Commission but for which the carrier does not anticipate an abandonment or discontinuance application will be filed; ***.

The remaining provisions of section 1121.20(b) describe three other categories of line that must be identified on the system diagram: lines for which an abandonment or discontinuance application is pending before the Commission, lines which are being operated under subsidy; and all other lines on the carrier's system.

The purpose of requiring a public notice of lines "potentially subject to abandonment" is, as we conceive it, two fold. First, it is to give notice to the users of the service provided over light-density branch lines, and the communities served by such lines, that they are likely to face an attempt by the carriers to abandon service. Second, it is to give the Commission, other Federal agencies, the States, local communities, rail service users, and the carriers themselves an opportunity to plan intelligently and effectively to develop and maintain an integrated transportation system.

There is general agreement that the system diagram should identify lines which the carrier itself intends to abandon in the foreseeable future. In fact, section 1a(5)(a) of the act requires that the system diagram depict lines which the carrier "plans" to abandon. Category 1 will, therefore, be retained.

The basic question raised by the comments of the parties, and which we must resolve, is whether it is sufficient to leave it to the discretion of the carrier to list on its system diagram as lines potentially subject to abandonment those which it has already concluded can no longer be operated viably, and which it currently plans to abandon (category 1 lines); or whether we should impose, as proposed in establishing category 2, some other measure which will result in a line's being included in the diagram as potentially subject to abandonment. We have no doubt that some objective standard of line viability would be desirable, and it was with this in mind that we originally proposed the listing of lines in category 2. The problem, however, is that the adverse effects of identifying the category 2 lines, as defined in the proposed regulations, on the system diagram appear to outweigh the benefits.

AAR would delete category 2 altogether to avoid stigmatizing the lines so listed in the mind of the public, and thereby eliminating any possibility of industrial development or increased traffic. The Pennsylvania PUC and UTU argue that listing a line in category 2 would sound "the death knell of any branch so listed as no shipper will locate on the line and existing shippers will seek other modes of transportation." The Western Region of the National Conference of State Railway Officials (Western Region) criticizes category 2 because "uniform application of the criteria to determine whether a line should be placed in this category is impossible." The National Industrial Traffic League (NITL), however, supports the proposed dual categorizing of lines "as both useful and workable."

We have concluded that the definition of lines falling into category 2 must be substantially modified. We do not believe it apprmisc to publicize, as economic losers, lines which the carrier has no thought of abandoning, and we agree with those who fear that such a label may discourage future business for the line and become a self-fulfilling prophecy. However, we believe that we must include in the regulations a category of lines "potentially subject to abandonment" in addition to those which the carrier itself has concluded should be made subject of an abandonment application.

Section 1a(5)(a) of the act requires the listing on the system diagram not only of lines which the carrier plans to abandon, but also of lines which are "potentially subject to abandonment" as defined by the Commission. Our reading of this language is that the establishment of two categories of lines potentially subject to abandonment has been mandated by the Congress. A second category of such lines will, therefore, be included, embracing lines which are being studied by the carrier as candidates for possible future abandonment because of excessive anticipated operating losses or rehabilitation costs.

The publication of the system diagram with these lines properly identified will alert the public not only to the carrier's present, but also to its long-range, plans. Thus appropriate contingency measures can be taken either to assure retention of the service or to make plans for handling the traffic involved by alternative means. The State, regional, or local planning bodies will be given a greater opportunity to study the impact of a potential abandonment on the economy of the area served by the line; to determine whether financial support should be offered in order to retain service; to determine whether any public use exists for the rail right-of-way involved; or to take other action to alleviate the problems which the users of the line would face if their service were terminated. At the same time, lines which the carrier has no intention of abandoning will not be listed and their future viability jeopardized.

In the regulations being adopted, category 2 (section 1121.20(b)(2)) will read as follows:

> (2) All lines or portions of lines potentially subject to abandonment which the carrier has under study and believes may be the subject of a future abandonment application because of either anticipated operating losses or excessive rehabilitation costs, as compared to potential revenues.

We are also amending section 1121.23 by adding a new paragraph (b) requiring that any system diagram which includes a line in category 2 must be revised annually to reflect clearly the carrier's decision whether to transfer the cateogry 2 line to category 1, whether to remove it altogether from the list of lines "potentially subject to abandonment," or whether to retain it in category 2 for further study.

The remaining categories will be adopted unchanged, and will include those lines for which an abandonment or discontinuance application is pending (category 3); those lines which are being subsidized under section 1a(6)(a) of the act or section 304(c)(2) of the Regional Rail Reorganization Act of 1973 (category 4); and all other lines which are owned and operated by the carrier (category 5).

Publication and amendment of the system diagram.—The proposed regulations governing the initial filing and publication of the system diagram and accompanying line descriptions appeared in section 1121.22, and the regulations governing their amendment and updating were contained in section 1121.23. The color-coded map and line description were required, under section 1121.22(a) and (b), to be filed with the Commission and to be served upon the Governors and public service commissions, or equivalent agencies, in the States where the carrier conducts operations. These provisions are retained in the regulations adopted, except that service of a color-coded map and line description upon the designated State agency (see section 803 of the 4R Act) will also be required.

Considerable controversy has arisen over the publication and posting requirements of proposed section 1121.23(c), which read as follows:

> (c) The carrier shall publish a black and white version of the system diagram map and the accompanying line descriptions in a newspaper or newspapers with statewide circulation in each State within which the carrier owns or operates a line of railroad and shall post a black and white or color-coded version of the system diagram map in each agency station and terminal located on a line of railroad owned or operated by the carrier.

It should be noted that these publishing and posting requirements would have applied both to the initial issuance of the system diagram and line description, and, under proposed section 1121.23(a) and (b)(1), to subsequent amendments and updates.

The railroad interests strongly object to the proposed publication and posting requirements as being excessively expensive and as serving no useful purpose. To some extent, we sympathize with their position. The clear language of the statute, however, requires the system diagram map to be published. To achieve technical compliance with that requirement, the Commission will arrange for publication in the Federal Register, but we do not believe that Federal Register publication alone would provide effective notice to the type of rail service user and local community served by light-density rail lines which are likely to be candidates for abandonment.

We will, therefore, require publication in a newspaper circulating in each county within which there is located a line listed in either category 1, 2, or 3. The newspaper notice will be required to include a copy of the system diagram map or, at the carrier's option, a portion of that map clearly depicting its lines in the county, as well as a description of each line in the county classified in category 1, 2, or 3.

We agree that the posting of a copy of the system diagram map in every station and terminal on the railroad would be unduly burdensome and would not really provide an effective means for public dissemination of information about lines potentially subject to abandonment. This requirement will be modified to require posting only in stations on or serving lines listed in categories 1, 2, and 3. The posting requirement may be fulfilled by simply posting a copy of the appropriate newspaper notice. The regulations will also provide that copies of the system diagram maps must be furnished, upon request, at reasonable cost.

As adopted, paragraph 1121.22(c) of the regulations will read as follows:

> (c) The Commission shall publish a black and white version of the initial system diagram map as submitted in accordance with section 1121.20(d) and accompanying line description in the Federal Register. The carrier shall (i) publish in a newspaper of general circulation in each county within which is located a line in category 1 through 3 (section 1121.20(b)(1)-(3)) a notice containing a black and white copy of the system diagram map (or of a portion of the map clearly depicting its lines in such county) and a description of each such line; (ii) post a copy of the newspaper notice in each agency station or terminal on each line in category 1 through 3 (section 1121.20(b)(1)-(3)) or, if there is no agency station on the line, at any station through which business for the line is received or forwarded, and (iii) furnish, at reasonable cost, upon request of any interested person a copy of its color-coded or black and white system diagram map and the publication in the county newspaper shall so indicate.

Finally, we are adding to this section of the regulations a new paragraph (e) providing for republication of the required notice should we find it to be inadequate.

Availability of data.—The South Dakota Department of Transportation (South Dakota) has suggested that railroads be required to make known the net salvage value of any line placed in category 1 in the system diagram. We agree that such information would be of value to the designated State agencies in fulfilling their planning functions. We will include such a provision in the regulations as section 1121.24, and will renumber section 1121.24 of the proposed regulations. However, instead of using the term "net salvage value," we will refer to "net liquidation value," which is defined in subpart D of these regulations. In addition to information as to net liquidation value, we think it appropriate to require the railroad, upon request, to provide a description of the lines in category 1 and of any appurtenant facilities, and of their condition. The new section will read as follows:

Section 1121.24—Availability of data

Each carrier shall provide to the designated state agency, upon request, information concerning the net liquidation value (as defined in section 1121.43(c) of this part) of any line placed in category 1 (section 1121.20(b)(1)) on its system diagram map or line description, together with a description of such a line and any appurtenant facilities and of their condition.

SUBPART C—PROCEDURES GOVERNING NOTICE, APPLICATIONS, FINANCIAL ASSISTANCE, AND ACQUISITION FOR PUBLIC USE

Notice.—Section 1121.30 of the proposed regulations provided for the posting of a notice of any proposed filing of an abandonment or discontinuance application; section 1121.31 specified the form of notice required.

These provisions required carriers, during the 30-day period prior to the filing of an abandonment or discontinuance application, to serve notice of their intent to abandon or discontinue service upon the Governors, public service commissions, and designated State agencies, of the affected States, and upon this Commission, and to post copies of the notice in stations on or serving the lines in question. Several parties have commented on the form of notice.

The Missouri-Kansas-Texas Railroad Company (M-K-T), expressed some confusion as to why we would require service on three State agencies when, in its opinion, service on only the Governor and the Public Service Commission should be sufficient. It recommends modifying the provision to require service on some other State agency only if such agency exists.

Under the act, States are required, *inter alia,* to designate an agency to administer their State rail plans before they can become eligible for national subsidy funds under the Local Rail Service Assistance provision of section 5 of the Department of Transportation Act, as amended by section 802 of the 4R Act. That agency might be the State's Department of Transportation, its Public Service Commission, or some other governmental unit. Whatever agency is so designated, we think it self-apparent why it should be served with the applicant's notice of intent. Furthermore, we view it to be abundantly clear that if a State has not designated a State agency, then no such agency exists for purposes of service of the notice. Likewise, if the designated State agency is the Public Service Commission, service of a single notice will satisfy the service requirement of the regulations.

DOT considers the prescribed notice form inadequate because it fails to address the issue of what the reader is supposed to do in response. It suggests that the regulations be amended to delete the paragraph describing actions which can be taken pursuant to the notice.

As previously indicated, notice of intent must be published within 30 days of the actual filing of the application. This requirement serves to alert all interested persons of the imminent filing and allows for the prompt request for an application by a potential offeror of financial assistance or other interested person. We remain firm in our view that, at minimum, the notice should advise interested persons of their right to recommend approval, disapproval, or other action by the Commission and to become parties to the proceeding by filing a petition to investigate or written comments. However, in consideration of the confusion the proposed form has generated, and rather than exclude from the notice any advice as to what action may be taken, we have revised the form to expand upon what information will be required in a comment or petition. We will also require that the notice advise any interested person proposing to file a comment or petition that the applicant will furnish a copy of the application upon request. This will serve both to provide prospective parties with the best possible information about the application and to assure that the Commission will not receive comments based on inadequate information. Other modifications to the notice are being made to conform to certain changes in the requirements for participation in the proceeding discussed below.

The application.—Section 1121.32 of the proposed regulations detailed the required contents of an abandonment or discontinuance application. As pointed out in the notice of proposed rulemaking, the time limits established by the 4R Act amendment leave us no choice but to require that virtually the entire case-in-chief be submitted by each applicant with the initial filing of its application. In addition, certain data were required in order to enable persons interested in acquiring or subsidizing a line proposed for abandonment to make the necessary cost and revenue determinations. For the most part, the parties have recognized the constraints under which the Commission must operate in processing applications and the overriding congressional intent both to expedite the handling of abandonment proceedings and to assure that all interested persons are provided with full and complete information about the carrier's proposal.

We will take up first objections which have been raised to the inclusion of certain information requirements in the application. The M-K-T and the Seaboard Coastline Railroad Company object, first, to the requirement of section 1121.32(c)(5) that overhead or bridge traffic handled on the line to be abandoned be identified by carload commodity group tonnage. Our present regulations governing the filing of abandonment applications require that this traffic be identified, and we have not found that this requirement has been unduly difficult for applicants to meet—perhaps because the majority of abandonment applications involve branch lines which carry little or no bridge traffic. Where the line does carry such traffic, that fact is obviously of importance in determining the place the line plays in the carrier's overall system. The regulations adopted will retain this requirement.

These same two carriers also claim that the inclusion of the requirement in section 1121.32(d)(3) that the application include a computation of the estimated subsidy payment would be unduly burdensome. We think it essential, if the Commission is to obtain accurate information concerning the profit or loss which resulted in operating the line, to require the carrier to provide us with a computation of the avoidable costs, revenues attributable, and reasonable return on the value of the line which is the subject of the application, as these terms are defined in subpart D of the regulations. Having made these computations, we fail to see why the further computation of an estimated subsidy payment should pose any problem whatsoever to the applicant.

Two other points raised by the parties are, we think, well taken. Section 1121.32(c)(3) will be modified to require the carrier to inform us of the *average* number of locomotive units operated on the line during the 2 years preceding the filing of the application. Also section 1121.32(c)(4) will be modified so that the applicant need not pinpoint its carload commodity group tonnage by station. As pointed out by DOT and M-K-T, to require identification by station would increase the likelihood that confidential shipper information would be disclosed.

Under section 1121.32(e)(5), the carrier would be required to state whether properties proposed to be abandoned are suitable for use for other public purposes. DOT expressed reservations on the efficacy of this requirement, citing the railroads lack of expertise in the matter. We agree that many States may be better equipped to deal with the problem; however, requiring the railroad to present us with its view will assure that the issue is clearly presented; and indeed, we think that in many instances the railroad will prove to be well informed on this matter. We are aware of a number of cases in which the carrier worked closely with the local community in an effort to gain its support for a particular abandonment proposal, and was thus well aware of possible community uses for its property. We would, of course, hope and expect that the affected State and local agencies would also submit their views.

South Dakota has questioned whether section 1121.32(f) constitutes an attempt to transfer the Commission's responsibilities under the National Environmental Policy Act of 1969 to the railroads. It further states that serious questions could be raised as to the propriety of having the proponent of the action prepare the environmental data.

The Commission is required to make a finding, based upon its own analysis, of the effect of an abandonment upon the environment. To do this expeditiously, we require the submission of environmental information by the applicant at the inception of the process. The data submitted is then examined independently and impartially. Also, since the applicant has standing to make known its views about the environmental impact of its proposal, this factor becomes a necessary part of its case-in-chief. As is the case with respect to the carrier's statement on community impact, interested persons may comment on the environmental statement or petition for investigation. In short, we are of the opinion that South Dakota's apprehension that the Commission's environmental decision will be grounded only upon a consideration of the carrier's partial and possibly inaccurate data is totally unfounded.

Several suggestions which we believe have merit have been made for the inclusion of additional information in the abandonment application. We will amend section 1121.32(b)(1) of the regulations to require that the applicant include in its statement of the condition of the line a description of any operating restrictions currently imposed. Section 1121.32(c)(8) will be modified to require a statement of any important changes in train service effected in the 5 years preceding the filing of the application. Finally, section 1121.32(e)(4) will require the applicant to recite any efforts it has made to continue service through the solicitation of traffic or by seeking a buyer or subsidizer for the line. This information will assist the Commission in developing a full understanding of the conditions surrounding the filing of the application. Perhaps more important, it will provide persons interested in purchasing the line or in offering a subsidy with background information which would be of material help to them in making their decision.

The Railroad Task Force for the Northeast Region, Inc., asks that applicants be required to include a history of the ownership of the line and of any leases, and a description of any reversionary interests. We recognize the value of this information, particularly for a community considering whether railroad property would be suitable or available for some public use, but we believe that imposing a requirement as broad as has been suggested would result in placing an undue burden upon the applicant. We will, however, provide in section 1121.32(e)(5) that the applicant disclose any restrictions upon the title to the properties, including any reversionary interests, of which it may be aware which would affect the transfer of title or the use of the properties for other than rail purposes.

Service and filing of the application.—Several of the parties express concern that a copy of the application might not be served upon all interested persons. As initially proposed, in section 1121.34(d) the carrier would be required to file an application with the Commission, the Governor of the affected State, the Public Service Commission (or equivalent agency), and the designated State agency. The carrier was further required to serve a copy upon any person submitting a petition for investigation or written comments. We have revised this section to require that, in addition to serving the above mentioned persons, the applicant furnish upon request, by first-class mail, a copy of the application to any interested person proposing to comment or petition for investigation. This addition is primarily designed to accommodate those persons who are unsure of their specific interest in the proceeding at the time of filing and may not wish, upon review of the application, to be shown as parties. However, we have also provided that copies of the application be deposited at places where the regulations require posting of the notice as specified in section 1121.34(c) and (d). We do not envision any significant increase in the burden imposed upon the applicant since we expect that anyone anticipating an interest in the proceeding will utilize the provision for filing comments.

BRAC and RLEA intimate that unless its officers receive copies of the application at the time of filing they might not have sufficient time to determine *not* to file petitions opposing abandonments. Under the revised regulations, BRAC, RLEA, or any other interested person need simply request, upon notice of the carrier's intent to file an abandonment application, that it be served with an application. Since the notice of intent must be published during the 30-day period prior to the actual filing, and service thereof must be completed at least 15 days prior to filing, we believe any interested person, including the labor organizations, will have ample time to make its request upon the carrier and formulate its comments or petition to investigate.

A number of comments received were in support of section 1121.34(e)(1) providing for the rejection of applications not in compliance with these rules. Many of the participants suggested modifications providing for mandatory rejection, a statement of reasons for the rejection, a means for the public to alert the Commission to defects in the application, service of the rejection order on parties to the proceeding, or allowance for the revision and resubmittance of the application within a reasonable time. All these provisions are already provided for in the regulations or are traditional procedures for the Commission.

M-K-T claims that this regulation could constitute a severe penalty for failure to comply in some minor matter. We disagree. This authority is no less than that always possessed by the Commission. Furthermore, opportunity is provided for the submission of a revised application. Nevertheless, since section 1a(3) of the act provides that the 60-day period the Commission has to issue a certificate in an uncontested and noninvestigatory proceeding does not begin to run until there has been submitted a completed application, it is conceivable that a carrier required to continue operations during the delayed period might view the requirement as a penalty. However, as we view it, if this is indeed a penalty, it certainly is not a severe one in light of the resubmission provision and it is one the carrier may very easily prevent in the first instance.

Although we feel it goes almost without saying, there is one other point of confusion we are constrained to clarify in response to several comments received. If the application is incomplete, its filing defective, or proper notice is not provided, our order rejecting the application will state the reasons therefor. In addition, all parties to the proceeding will receive service of the rejection order as part of the standard procedure for all administratively final orders. The regulations have been revised accordingly.

Participation in abandonment proceedings.—Under proposed section 1121.36, a person could file either a petition to investigate or a written comment within 45 days of filing of the abandonment or discontinuance application to become a party to the proceedings. The notice of proposed rulemaking stated that an investigation will be instituted upon receipt of a petition to investigate or may be instituted on the Commission's own initiative. Written comments were to be considered in this determination but would not, of themselves, be deemed to require an investigation. This wording has apparently prompted significant misunderstanding in two respects not intended by the Commission: (1) that the Commission has discretion with respect to instituting an investigation if a petition to investigate is filed, and (2) that comments and petitions to investigate are substantially the same and that either will automatically trigger an investigation. The regulations, and certain aspects of the notice of intent, have been modified for clarification. Moreover, several additions have been made to emphasize the distinctive role petitions and comments will play in abandonment and discontinuance proceedings.

Section 1a(3) of the act provides that the Commission *shall*, upon petition, or may upon its own initiative, cause an investigation of an abandonment proposal to be conducted. As we interpret that language, if a petition to investigate is filed—by any person—we have no discretion but to institute an investigation. The congressional intent could hardly be clearer, and we intend to follow the language of the statute.

It is because the institution of an investigation is mandatory upon the filing of a petition to investigate that we provided for the filing of comments as an alternative means for interested persons to become participants to an abandonment proceeding. Those who have some objection to the abandonment proposal which they believe can be met by the imposition of a condition to which the applicant would agree, or who simply seek clarification of some point in the application, would be able to take the "comment" route, and thus have the opportunity to make their views known without requiring the institution of a full-scale investigation.

One example of the anticipated use of comments would be in the request for the imposition of labor conditions. Traditionally and invariably, the railroad labor organizations make this request in all abandonment proceedings. Since the development of the "New Orleans" and "Burlington" conditions, such requests have been granted and conditions imposed, generally without opposition.

Because of the requirement of section 1a(4) of the act, there is obviously no need to institute an investigation in such a case. The regulations have been revised to clarify the Commission's position in this regard.

Several parties have raised the possibility that petitions to investigate might be based upon frivolous objections, resulting in the institution of investigations costly to all parties. AAR and DOT have suggested that the proposed regulations be amended to require all petitioners to reveal their interest in the proceeding, and for petitioners who are shippers, to include a description of the business for which a transportation need exists, a description of the petitioner's facilities to handle shipments by other modes, data concerning volume of traffic shipped and received by each mode for 2 years, and various other data reflecting the interest of the shipper. In addition, AAR requests that the proposed regulations be amended to allow a carrier to file a reply to petitions and comments.

Although we agree that information about a petitioner's interest should be provided, we think that the requirements of the proposed regulations were generally adequate for this purpose. In our view, the legitimacy of the petition is effectively established by its submittal as a verified statement. To require the detailed information which DOT and AAR suggest be included could well discourage the filing of legitimate petitions.

Finally, we are revising the proposed regulations to allow for replies to comments and petitions. To facilitate the submission of replies, to both comments and petitions, we have reduced the period for filing from 45 to 35 days. Replies must be filed with the Commission within 45 days of the date the applicant files its application for abandonment. We fail to see any merit in BRAC's and RLEA's contention that 45 days for filing comments or petitions renders impossible the deliberative consideration of an abandonment application by an interested party. As discussed elsewhere in this report, if an application is opposed a certificate of public convenience and necessity permitting the abandonment or discontinuance may not be granted if the carrier had not listed that particular branch line on its system map in category 1 for 4 months prior to filing of the application. At a minimum, interested persons effectively have 120 days advance notice of the filing; hence, at least that much time is available to determine what action, if any, they intend to take. The notice form has been revised to reflect the new time periods.

Financial assistance procedures.—Extensive comments were received on this aspect of the proposed regulations, which appeared as section 1121.38. However, we believe that only minor modification and clarification of this section are necessary.

As initially proposed, section 1121.38(a) provided that the Commission publish its findings that public convenience and necessity permit abandonment or discontinuance in the Federal Register, as notice to persons contemplating offers of financial assistance to assure continued rail service under section 1a(6) of the act. AAR believes that some ambiguity exists as to when the Commission's public convenience and necessity findings would become administratively final, and is of the opinion that this ambiguity results from the Commission's dual task of finding public convenience and necessity and providing an opportunity for subsidies. It suggests a redraft of this section, the principal effect of which would be to make the 30-day time period of section 1121.38(f) run concurrently with the period for petitions for reconsideration of the Commission's finding of public convenience and necessity. This was not the purpose of proposed section 1121.38(a), and we believe that AAR's proposed clarification is inappropriate. The section will be modified slightly to indicate clearly that it envisions publication of administratively final findings and subsequent, not concurrent, procedures under section 1121.38(f). As revised, it will read as follows:

> (a) In any proceeding in which the Commission finds, after investigation or without such investigation, that the present and future public convenience and necessity permit or require the proposed abandonment or discontinuance of rail service, the Commission will, prior to the issuance of an effective certificate authorizing the abandonment or discontinuance, publish such findings in the Federal Register as notice of a final opportunity to persons intending to offer financial assistance to assure continued rail service under section 1a(b) of the act and pursuant to this section of the regulations. This Federal Register Notice will be published when the proceeding is administratively final.

A substantial number of comments were received on proposed section 1121.38(b)(1)(i) which would require that an offer of financial assistance be filed and served no later than 15 days after the publication in the Federal Register of the Commission's findings of public convenience and necessity required by section 1121.38(a). Numerous parties, including Iowa, South Dakota, RLEA, and BRAC claim that this 15-day time period is too short, that receipt of the applicable Federal Register cannot be guaranteed, or that not all potential offerors even receive the Federal Register. The Western Region of the National Conference of State Railway Officials

(Western Conference) would have notice of the Commission's findings sent directly to all parties of record, while AAR would leave the proposed section unchanged.

We believe that it is not necessary to alter the requirement that all offers of financial assistance be filed within 15 days of publication of findings in the Federal Register. In fact, to do so would seriously jeopardize the Commission's ability to make its statutory findings, under section 1a(6) of the act, that a financially responsible person has offered financial assistance to enable the rail service to continue and that such an offer meets certain cost criteria. Such findings must by statute be made within 30 days of publication in the Federal Register. A minimum of 15 days will be necessary for the Commission to give conscientious consideration to its decision on the offer of financial assistance, and to extend the number of days allowed offerors of financial assistance would further reduce this already compact time period.

We believe that such a time table will not be unduly burdensome to potential offerors of financial assistance for several reasons. Interested persons will have notice of the abandonment filing, since the line involved must be in category 1 on the system diagram map and that fact publicized in newspapers of general circulation in the affected counties. Notice of intent to abandon a line or discontinue service will be served on the Commission, certain State officials and agencies and significant users at least 15 days prior to actual filing of the application. Additionally, proposed section 1121.38(b)(1)(i) provides that an offer may be filed and served at any time subsequent to filing of an abandonment or discontinuance application. Finally, provision will be made so that the order issued under section 1121.38(a) will inform the parties of the date on which offers of financial assistance must be filed pursuant to paragraph (b). Considering the time which interested persons have to plan and make an offer under the regulations promulgated herein, we believe that the direct notice proposed by the Western Conference and the proposed changes in section 1121.38(b)(1)(ii) are unwarranted.

AAR and DOT believe that the contents of the offer of subsidy as required by paragraphs (b)(2) and (3) are redundant, and that governmental entities should be required to supply the additional financial responsibility data. We disagree. First, we believe that the information required by these two paragraphs is essential if the Commission is to make the required statutory findings that a firm subsidy offer has been made and that it has been made by a financially responsible person. Second, we think that the requirements of paragraph (b)(2) are sufficient to inform us of the financial resources and funding authority of a Government entity.

The detailed balance sheet and income statement data required of nongovernment entities under paragraph (b)(3), while appropriate for private businesses and individuals, are, in our view, unnecessary to the making of our determination of the financial responsibility of a State or local Government or Government agency.

The possibility exists that certain offerors of financial assistance would desire to make a subsidy payment to encompass operations over only a portion of the line for which a finding of public convenience and necessity has been made. Paragraphs (d)(1) and (2) provide for partial acquisitions of lines and a mechanism for the offeror to obtain information relevant to the cost of a partial acquisition. Paragraph (c)(1) will be modified to provide for offers of subsidy for portions of lines and the procurement of data to make such offers. Also, a new subsection (g) will be added providing that "offerors may request, and carriers shall provide, an estimated subsidy payment reflecting operations of less than the entire line." These changes should facilitate offers of subsidy for portions of lines, where it would not be economically viable to subsidize the entire line sought to be abandoned.

The addition of subsection (g) will result in a renumbering of subsections (g) through (i) to subsections (h) through (j).

AAR has questioned the silence of the proposed regulations with respect to the question of rail service continuation payments during any period of negotiations between a carrier and the offeror of financial assistance. It believes that any party that desires rail service continued at the carrier's expense could make an offer meeting the requirements in section 1121.38(f)(1) and, by submitting the material required in section 1121.38(b), could prolong unprofitable rail service, at the carrier's expense, for as long as 6 months. This, AAR suggests, would provide a powerful incentive for offerors to delay reaching an agreement until near the 6-month deadline.

AAR requests that the proposed regulations be amended to provide that offerors of financial assistance be made responsible for paying the difference between the revenues attributable to the line and the avoidable cost of providing service on the line, plus a reasonable return on the value of the line, from the date the Commission postpones issuance of a certificate authorizing abandonment or discontinuance. If agreement were reached, payments would be made retroactive to this date. Where no agreement was reached, the offeror would be bound to pay the carrier's shortfall on the line during the period in which negotiations continued, according to the Commission's own determination of the amount of shortfall under section 1121.38(f)(1). AAR would further extend this to offers to acquire lines by making offerors pay interest on the agreed upon value (or, where negotiations fail, on the Commission-determined value) of the line from the date of the Commission's postponement of certification until the date of closing. AAR states that this conforms to the intent of section 1a(6)(a)(1) of the act to make the carrier whole from the date of issuance of the certificate. In its reply DOT basically agrees with this position.

We are in complete disagreement with the positions of AAR and DOT, and are firmly convinced that the statute contemplates the operation of the line, without financial assistance, until an agreement is reached, or a certificate issued. Section 1a(6)(a) of the act states that the Commission "shall postpone the issuance of a certificate of abandonment or discontinuance for such reasonable time, not to exceed 6 months, as is necessary to enable such person or entity to enter into a binding agreement, with the carrier seeking such abandonment or discontinuance, to provide such assistance or to purchase such line and to provide for the continued operation of rail service over such line."

Common carriers by railroad have a statutory duty to perform service over their lines until issuance by the Commission of a certificate of public convenience and necessity authorizing abandonment of the line or discontinuance of operations. The statute envisions a delay in issuance of such a certificate pending negotiations of offers for financial assistance. During this period, the carrier is still under its common carrier obligation to perform service. We are unable to find in the legislative history, or in the clear wording of the statute, any indication that Congress intended to make financial assistance available to the railroad during this maximum 6-month period or to relieve the railroad of its statutory obligation to perform service at its own expense. To clarify this, the following sentence will be added to section 1121.38(f)(l)(ii): "During the negotiation period, or in any event no longer than 6 months, the carrier shall continue to provide service at its own expense."

A number of comments addressed proposed section 1121.38(h)(2)[3] of the proposed regulations, which provided as follows:

> (2) If during the 6-month negotiation period the parties are unable to execute a financial assistance agreement, the Commission may—

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[3] In the regulations being adopted, this provision has been redesignated as section 1121.38(i)(2).

(i) Issue a final certificate at the end of the 6-month period which shall become effective and may be conditioned in accordance with the provisions of section 1a of the act and these regulations;

(ii) Reopen the underlying abandonment or discontinuance proceeding to reevaluate the application on its merits in light of the financial assistance offer;

(iii) Direct the carrier to continue to provide rail freight service for an additional year in return for compensation to be computed by the Commission from its earlier determination under section 1a(7) of the act, as modified to reflect current circumstances, and in accordance with the standards established in subpart D of these regulations; or

(iv) Take whatever action is appropriate to the particular situation and in conformity with section 1a of the act.

The majority of those commenting on this provision were concerned about paragraph (2)(ii) and the possibility that the Commission might reopen the abandonment or discontinuance proceeding to reevaluate the application on its merits in light of the financial assistance offer, if no binding agreement had been reached between the parties. AAR believes that section 1a(6) of the act does not give the Commission the power to reopen the abandonment proceeding in such a situation; that the statute clearly indicates that issuance of a final certificate can only be postponed for a reasonable period, not to exceed 6 months, if no binding agreement is reached; and that, the Commission's action, as contemplated in proposed paragraph (2)(ii), would flout congressional intent. DOT and M-K-T see no reason to reopen the underlying abandonment application simply because negotiations for an offer of financial assistance have failed. Maryland feels that additional legislation is necessary to require a carrier to continue rail service over a line for which a reasonable subsidy has been offered. Iowa suggests that the act be amended to require that the Commission adjudicate the offer of financial assistance if the parties fail to reach an agreement. DOT would amend paragraph (2)(iii) to allow the Commission to order the continuation of operations for 1 year if the railroad refuses to accept the subsidy offer it has calculated, and an alternative section where, if negotiations were stalemated, an extension of time could be granted and the Commission could determine the necessary subsidy amount. The offeror would then have 1 week to accept or reject that subsidy figure. If rejected, the line could then be abandoned.

The comments received clearly indicate that the parties are concerned that the Commission does not have the power under the act to reopen the underlying abandonment or discontinuance proceeding as proposed in subsection (2)(ii). However, we are confident that the Commission has such power, and will briefly discuss how the four alternatives in paragraph (2) (i)-(iv) will be used to further the intent of Congress to establish an abandonment and discontinuance process that would facilitate the financial assistance program.

The statutory authority to reopen the underlying abandonment or discontinuance proceeding is found in newly enacted section 17(9)(g) of the act: "the Commission may, at any time upon its own initiative, on grounds of material error, new evidence, or substantially changed circumstances—(i) reopen any proceeding; (ii) grant rehearing, reargument, or reconsideration with respect to any decision, order, or requirement; and (iii) reverse, modify, or change any decision, order or requirement. The Commission may establish rules allowing interested parties to petition for leave to request reopening and reconsideration based upon material error, new evidence, or substantially changed circumstances." Thus, the clear power to reopen proceedings is contained in the act. The parties to this proceeding are essentially correct when they assert that such a reopening might tend to blur the distinction between the finding that public convenience and necessity require the abandonment or discontinuance and the Commission's determination of the appropriateness of the offer of financial assistance under section 1121.38(f). However, the offer of financial assistance and the rejection of such an offer is clearly a substantially changed circumstance under the terms of section 17(9)(g) of the act, and in some situations could be viewed as being a determinative factor in influencing the Commission's initial finding that public convenience and necessity required the abandonment or discontinuance of the line.

We emphasize that this power to reopen proceedings will be used sparingly, and only upon evidence of clear recalcitrance on the part of the applicant carrier. However, we do believe that this provision is necessary to effectuate the intent of Congress that every opportunity be afforded to preserve rail service, especially if a potential subsidizer or purchaser has made a reasonable offer of financial assistance.

Finally, some of the parties have expressed concern with the vagueness of subsection (2)(iv); however, we believe that such a provision is necessary. At this time the Commission is promulgating procedural regulations, and, because it is difficult to predict what problems could arise under section 1121.38, this subsection is essential to allow the Commission to implement the rail service continuation procedures which were embodied in the 4R Act. Subsection (2)(iv) will be expanded slightly to read as follows:

(iv) Take whatever action is appropriate to the particular situation and in conformity with section 1a of the act. Such action may include but not be limited to setting the matter for arbitration, subject to final review by the Commission.

The Comments of the Western Conference and South Dakota to section 1121.38(j), Reservation of Jurisdiction, request that reopening be made mandatory upon termination of the financial assistance agreement. AAR believes that the Commission was correct in allowing itself discretion in reopening the proceedings. We can envision a situation where, upon termination of a financial assistance (subsidy) agreement, a line would be rehabilitated to such an extent as to seriously question the validity of the Commission's previous finding of public convenience and necessity. We are also cognizant of the fact that State Governments are somewhat concerned about operating a line over which final issuance of a certificate of public convenience and necessity has merely been postponed pursuant to section 1121.38(f) of the regulations promulgated herein and section 1a(6) of the act. We believe that the discretionary approach to reopening is more appropriate, since the Commission will be able to evaluate whether, in fact, there have been any changes in circumstances resulting from the financial assistance program. This subsection is renumbered (l) and slightly modified to read:

(l) *Reservation of jurisdiction.*—The Commission reserves the right to reopen on its own motion or on petition an abandonment or discontinuance proceeding to consider, among other things, any change in circumstances resulting from a financial assistance program which may reflect upon the merits of the abandonment or discontinuance application.

A new section, designated as 1121.38(k), will be added to outline procedures in the event of a default of the financial assistance agreement:

(k) *Default on agreement.*—In the event any party to a financial assistance agreement defaults on the obligations hereunder, then any party to the agreement shall promptly inform the Commission. Upon notification the Commission will take such action as it may deem appropriate. This subsection should not be interpreted to mean that the Commission will determine that a contractual default has in fact occurred.

Other public use.—The Railroad Task Force for the Northeast Region has requested certain changes in section 1121.39—Public Use Procedures—to facilitate preservation of lines for possible inclusion in the Fossil Fuel Rail Bank pursuant to section 810 of the 4R Act. Specifically, it requests that no certificate be issued to require that the properties listed in the USRA Final System Plan, Volume II, Part III, Section C, Lines Recommended for Consideration for Inclusion in a Fossil Fuel Rail Bank, be offered for acquisition for any other public purposes, except inclusions in such a bank, prior to the establishment of a Fossil Fuel Bank pursuant to section 810 of the act. The Secretary of Transportation has not established a Fossil Fuel Bank pursuant to section 810 at this time. While we decline to make the changes requested, upon issuance of a certificate of public convenience and necessity authorizing abandonment or discontinuance of lines recommended for inclusion in the Fossil Fuel Rail Bank, the Commission will take appropriate action to insure that the Secretary has the opportunity to exercise his options under section 810 of the 4R Act.

SUBPART D—STANDARDS FOR DETERMINING COSTS, REVENUES, AND RETURN ON VALUE

Subpart D of the proposed regulations contains the standards for determining the revenues attributable to the rail properties, the avoidable costs of providing service over those properties, and a reasonable return on the value of those properties, which are the subject of an abandonment or discontinuance application or an offer of financial assistance. The standards were based largely on the regulations (49 CFR 1125) developed for the administration of the subsidy program in the Northeast and Midwest Region.

The parties are generally in agreement with the avoidability concept reflected in the proposed standards. AAR, however, asserts that the proposed standards are incomplete and noncompensatory because they fail to recognize that portion of the common expense which varies directly with output. Contrary to AAR's contention, the proposed standards do recognize common variable costs. As the office pointed out in its regional rulemaking, while the phrase "avoidable costs" should be strictly construed, "this fact does not necessarily exclude indirect costs" (40 F.R. at 1617). The on-branch sections of the standards do not limit the railroad to recovering only its direct costs. A number of sections which prescribe apportionment methodology include indirect costs, *e.g.*, locomotives repairs (Account 311), yard transportation (Accounts 382, 383, 388), servicing train locomotives (Account 400), and train supplies and expenses (Account 402). In addition, common variable costs are taken into account in the calculation of off-branch costs (see 40 F.R. at 1268).

DOT argues that the standards fail to consider one important area of costs; that is, "the nonvariable costs (including traditional fixed and semi-variable costs) of the rail carrier which would normally be covered by [branch] revenues." DOT argues that "unless these nonvariable costs are covered by the subsidy, unsubsidized branch lines must, in fact, cover these costs from their own revenues."

DOT's position is inconsistent with the statutory criterion of "avoidable costs." Section 1a(11) of the act provides that "the term 'avoidable costs' means all expenses which would be incurred by a carrier in providing service which would not be incurred, in the case of discontinuance, if such service were discontinued, or, in the case of abandonment, if the line over which such service was provided were abandoned." As AAR aptly puts it, section 1a(11) largely prescribes what economists would term a condition of "economic indifference"; i.e., the economic consequences to the carrier are the same whether or not service is abandoned or discontinued. DOT in effect advocates the full distribution of costs. Congress was afforded an opportunity to choose between fully distributed and avoidable cost methodology (see Senate Report 94-31, 94th Congress, 1st Session, pp. 660, 796, 804-05, 844-45). It rejected the former and enacted the latter; therefore, it would be contrary to statute to compensate the railroad for its fixed nonvariable costs.

Attributable revenues.—Proposed section 1121.41, covering determination of the revenues attributable to the branch rail properties, was patterned after similar provisions in the regional freight subsidy standards (49 CFR 1125.4). The responses addressed methods for line-specific revenue determination; the treatment of overhead traffic; traffic interchanged through junctions located on the branch; and revenues from transit shipments.

Line-specific determination.—In the notice (41 F.R. at 31882), the Commission expressed the view that, although the concepts of the regional standards had withstood court challenge, the circumstances surrounding this proceeding are sufficiently different that it would be desirable to develop an alternative method for attributing revenues to the branch in order to eliminate the necessity for determining off-branch costs. In inviting suggestions on this point, the Commission was mindful that in the congressional hearings dealing with branch line legislation, a railroad industry representative had urged that revenues and costs for light-density lines should be associated only with the specific line segment (see testimony of J. H. Williams, Senate Report 94-31, 94th Congress, 1st Session, page 806). Although Congress did not adopt this "specific line segment" recommendation as a requirement of the act, the Commission deemed it appropriate to afford industry representatives an opportunity to implement the recommendation, and thus obviate the problems of off-branch costing.

AAR's initial response on this point was that "the industry has tested a number of alternative hypotheses for determining 'revenue attributable' to separate off-branch revenues. While some have shown promise as a basis for later development of alternative methods, we are not able at this time to suggest an alternate formula which can be given national application."

Coopers & Lybrand propose that revenues be attributed to the branch on the ratio of miles on the branch to miles on the system; initial or final switching charges would also be assigned to the branch. AAR replies that while "there is no entirely proper way to separate on-line and off-line revenues," it supports the Coopers & Lybrand approach since it would eliminate consideration of off-branch costs. However, most freight tariffs applicable to branch line traffic do not include initial or final switching charges, thus, a straight mileage pro rate would be unreasonable because it would not recognize the costs of originating or terminating traffic on the branch.

PUC and UTU suggest alternative methods: first, a mileage pro rate system involving the allocation of arbitrary 50-mile "blocks"; or second, yearly Commission publication of the average cost of originating or terminating one carload for use in calculating the total revenue to be attributed to the originating and terminating traffic. In addition, the branch line would be credited with 50 percent of the off-branch system revenue. AAR objects, properly we think, that these methods as proposed would produce arbitrary and inaccurate results, and that they lack conceptual foundation. DOT objects to the proposals of both Coopers & Lybrand and Pennsylvania PUC and UTU.

In sum, although the parties have not as yet presented a workable alternative, AAR states that it is testing alternate hypotheses, some of which show promise. Coopers & Lybrand also is making further studies. Consolidated Rail Corporation (Conrail) is conducting a number of subsidized branch line operations under the regional freight standards and also interchanges traffic and has negotiated divisions with several other designated operators of subsidized branch lines. While not a party to this proceeding, it has informally expressed willingness to conduct experiments with alternative methods of computing branch line attributable revenues, and revision by the office of the regional standards to accommodate such an experimental program is under consideration. The results of these experiments, when available, may be expected to shed new light on this problem.

The principal advantage of developing an alternative to the present method of attributing the revenues of originated and terminated traffic would be to eliminate off-branch costing. The Commission will be receptive to future proposals which would achieve this result. Generally, such proposals should meet the same tests of justness and reasonableness as would be required of divisions of joint rates under section 15(6)(a) of the act.

Overhead traffic.—Proposed section 1121.41 would attribute revenues of bridge and overhead traffic on the basis of miles moved on the branch to miles moved on the system. AAR notes that most carrier records are not prepared in a manner which would develop internal junctions as distinct from either major gateways or interchange points with other carriers. The cost of developing programs which cover all possible routings over lines of each applicant would, it asserts, be prohibitive. Because of similar representations, and in the interests of minimizing required recordkeeping, the standards have been revised to provide that, with respect to overhead traffic, the parties to a subsidy agreement are not bound by the mileage apportionment method, but may negotiate a mutually acceptable usage fee.

AAR also argues that revenues from overhead traffic which could be retained in the railroad's system by diversion to other, possibly more circuitous routes, should not be attributed to the branch, but that any reduction in revenues or increase in expenses resulting from such rerouting should be treated as reduction of losses incurred in operating the line to be abandoned. It is appropriate to note here that section 1a(3) of the act places the burden of proof as to public convenience and necessity upon the applicant in an abandonment proceeding. Proof that traffic moving over the branch will be retained in the event of abandonment will be entitled to appropriate weight in an abandonment proceeding. However, as DOT correctly states, for subsidy purposes the question is what is the present traffic on the branch. If the branch is not actually abandoned because a subsidy is offered, the Commission does not think it equitable to require the subsidizer to be deprived of credit for revenues from traffic either actually or hypothetically diverted from the branch for the purpose of increasing the subsidy.

Traffic interchanged on the branch.—The standards have been revised to provide that traffic interchanged at a junction on the branch will be considered as having originated or terminated on the branch, and the revenues attributed accordingly. This should resolve the problem presented by Green Bay & Western concerning its car ferry connections.

Transit shipments.—In a supplemental notice issued August 19, 1976 [Ex Parte No. 293 (Sub-No. 2)], the office proposed to amend the regional standards to clarify that the branch should be credited with the full revenue received by the carrier from transit shipments (including any transit charges collected) rather than only the revenue from that portion of the movement between the on branch originating or terminating point and the transit point. Comments addressed to this issue were received in this proceeding, and in Ex Parte No. 293 (Sub-No. 2); for the purposes of this discussion, they will be considered as if all had been submitted in this proceeding.

AAR concurs with the suggestions of South Dakota and NITL that revenues from true transit shipments should be attributed to the branch and believes that the regulations as written appropriately deal with this matter. AAR would, however, exclude revenues on proportional rated movements beyond the proportional rate point.

It is the Commission's intention that the revenues attributable to the branch, for both abandonment and subsidy purposes, should include all revenues generated by traffic originated or terminated thereon, including transit revenues; and we see no reason for excluding any revenues from proportional-rated traffic. The responses of Agway, Inc. (Agway), and of Conrail indicate that this intention is not being fully implemented in the reporting of revenues under the regional subsidy program, and that there are some practical difficulties arising out of the increasing dependence of rail managements on computerized recordkeeping , *e.g.*, that revenues on light-density line shipments afforded certain types of transit privileges could be subject to adjustment up to 2 years after original submission of the shipper's registration on the car. Therefore, Conrail asserts that the administrative costs to implement the proposal would far outweigh the slight refinement in revenue reporting which would result. Agway, however, appropriately notes that Conrail's tariffs normally include separate charges for transit privileges which it believes are at a level sufficiently high not only to cover, but more than cover, the extra costs associated with the transit service.

Although we recognize the difficulties pointed out by Conrail, and have no desire to impose undue accounting or recordkeeping burdens, we cannot concur that the exclusion of any revenues properly attributable to the branch, for either abandonment or subsidy purposes, is acceptable. Therefore, the standard is revised to specifically require the inclusion of transit revenues.

Such traffic may be consequential to the viability of some branch lines; in other instances, it may be sporadic or nonexistent. Where a branch is used for the movement of transit traffic, the movements are likely to be repetitive and to occur with some frequency. In each case, the railroad is in possession of the relevant data. For abandonment purposes, it may satisfy its burden of proof by submitting the results of special studies, rather than detailed accounting data covering an extended period, provided that it shows such study results to be representative. For the purposes of subsidy agreements, the railroad and the subsidizer may agree to a revenue adjustment based on sampling studies or other appropriate procedures in lieu of the recording of actual detailed full transit revenues. In any event, provision for full recognition of transit revenues must be made.

AVOIDABLE COSTS OF PROVIDING SERVICE

Administrative costs.—The proposed standards allow one-half percent of attributable revenues as an avoidable cost to the railroad to cover the expenses of administering the subsidy program. AAR while agreeing in principle with this allowance asserts that administrative costs of planning, recordkeeping, conformity with Federal Railroad Administration regulations, and day-to-day services are so high that the one-half percent administrative fee is not compensatory. It specifically relies on Conrail's experience in its administration of the 142 subsidized branch lines in the Midwest and Northeast Region. AAR asserts that Conrail's total cost for the subsidy program approximates more nearly 2 percent of its revenues attributable.

Indisputably, the railroad should be reimbursed for the actual costs of the subsidy program. Conrail has raised the same issue in the proceeding involving the regional subsidy standards [Ex Parte No. 293 (Sub-No. 2)] and, an on site audit has been conducted by the office indicating that Conrail's actual subsidy program administrative costs exceed 1 percent of its projected revenues.

In these circumstances, the best course of action would appear to be to allow the railroad to choose either to recover the actual direct costs of the subsidy program or to take a 1 percent administrative allowance in lieu of actual expenses. Specifically, the railroad would be entitled to be reimbursed for out-of-pocket expenses incurred during the subsidy period of maintaining and reporting the actual revenue, cost, and service unit data, and otherwise administering the subsidy program. It should be emphasized that the railroad may not allocate these general expenses on estimates of time expended or arbitrary formulae. Rather they must be predicated on detailed records of time spent by the persons administering the program and on invoices for services performed. Alternatively, the railroad may take a 1 percent administrative allowance in lieu of actual expenses.

Superintendence.—AAR asserts that the direct assignment of the costs incurred for supervising maintenance-of-way and structures, maintenance of equipment and transportation would require "an exorbitant amount of manual recordkeeping and clerical time." AAR deems it essential that the railroads be permitted to apportion such expenses and recommends that the apportionment be based on "tons of revenue freight" reduced to the "variability level shown in appendix F, ICC Statement ICC-73, and subsequent editions." M-K-T claims that superintendence costs "can rarely be determined on a direct basis for the normal, short branch line" and suggests that such costs be based on a "mileage pro rate."

The regional standards presently do not allow the railroad to recover any costs for the supervision of maintenance-of-way, maintenance of equipment or transportation on the branch line. This decision was predicated on the view that the amount of time that a superintendent would have to devote to a particular branch would be negligible, and therefore, his salary was not strictly avoidable. However, based on actual operating experience in the Midwest and Northeast Region, the office has recognized that a railroad operating several branch lines under subsidy may have to employ more supervisory personnel than it would in the absence of subsidized service. Therefore, it has instituted rulemaking to consider amending the regional standards to allow the railroad to recover the direct costs of supervision, based on the number of hours which a superintendent actually devotes to the branch line. The same approach is being applied in the national standards.

The Commission does not agree that it would be appropriate to apportion the common costs of superintendence between the branch and the remainder of the system. The standards already include a portion of such common costs in the off-branch cost formulae; in addition, the standards include an optional allowance of 1 percent of revenues to cover administrative costs should the railroad conclude that it is impractical to collect actual direct costs.

Structure maintenance.—AAR asserts that the railroad should be permitted to apportion accounts 227-265, excluding account 249, to assure that it will recover the common costs of maintenance of off-branch structures which are designed to and actually serve both branch and mainlines. We disagree; such common costs are taken into account in the off-branch cost calculation.

Track rehabilitation.—AAR asserts that limiting rehabilitation costs only to those necessary to reach FRA class I standards is inconsistent with statutory objectives in that it will not provide "adequate and efficient" rail service (section 5(f)(3) of the Department of Transportation Act). AAR recommends that the railroad be allowed to treat as avoidable such rehabilitation costs as are necessary to eliminate deferred maintenance and provide adequate and efficient rail freight service.

AAR misapprehends the track rehabilitation provision of the standards. It establishes FRA class I standards as a *minimum* level of service; however, if a subsidizer requests a higher level of service, which requires expenditures for track rehabilitation such expenses are properly avoidable. While it would be inappropriate to permit the railroad unilaterally to impose service levels above the minimum, the parties may mutually agree to a higher service level.

Traffic.—AAR alleges that by invoking an avoidability test for traffic expense (i.e., the railroad may recover only those direct expenses which would be avoided as a result of the service being discontinued) the standard "is written in such a way as to make it virtually impossible" to obtain reimbursement. AAR thus infers that "railroads are not expected to spend time soliciting branch-line traffic, providing rate quotations, et cetera."

AAR's inference is incorrect. We expect the railroad to make a conscientious effort to maximize branch line traffic in consideration for reimbursement for its net avoidable costs, plus payment of a reasonable return on its investment. We do not believe a railroad would be justified in ignoring or diverting branch line traffic merely because it did not subscribe to the avoidability theory of compensation adopted by Congress. The railroad is entitled to recover actual traffic costs directly attributable to the branch. It is not entitled to allocate common traffic costs which it would continue to incur if service on the branch were to terminate.

Other matters.—Based on the suggestions of the parties and the experience derived from operation of branch lines under subsidy in the Midwest and Northeast Region, the national standards have been revised in the following respects to cover more completely the avoidable cost of continuing service:

a. ***Running overhead from yard to branch; deadheading; taxi, and hotel costs.***—These categories of costs arise because of the location of, or the nature of the service required over the branch line. For example, it may be necessary for an engine crew and locomotive to run overhead from a yard, performing no work along the way, to reach a branch line which is the only duty assignment of the crew outside the yard. In these circumstances, the on-branch costs for crew, locomotive, and car costs per mile should reflect the overhead time and mileage. The off-branch costs per car mile must, however, be adjusted to exclude the overhead mileage. Deadheading, taxi, and hotel costs ordinarily would be included in wage accounts. The standards have been revised to require these costs to be maintained separately from wages to facilitate auditing.

b. ***Specialized equipment costs.***—The proposed standards are silent on the costs incurred for operating specialized locomotives and other equipment dedicated exclusively to serving the branch line. They have been revised to allow the actual repair and other costs of specialized equipment which are not used to serve any other portion of the railroad's system.

c. ***Roadway machines and tools (Accounts 269 and 271).***—To minimize recordkeeping and clerical time, roadway machine and small tool maintenance costs will be assigned to the branch in proportion to roadway maintenance costs (Accounts 202-220).

Capital related items.—In the notice (41 F.R. at 21882-3), the Commission proposed that the investment base for computing the "reasonable return" under section 1a(6)(A) of the act should consist of three elements:

(1) Working capital reasonably necessary for continuing the branch line operations, as contrasted with terminating them;

(2) Federal or State tax benefits foregone or deferred as a consequence of deferring retirement of properties proposed for abandonment; and

(3) The value of the properties held in service.

While the parties did not dispute this basic approach, several did suggest changes in the standards for computing certain capital-related elements of the avoidable costs and return on the value.

Allowable working capital.—Proposed section 1121.43(a) of the standards would allow working capital in the investment base equivalent to 15 days of on branch cash avoidable costs (on branch avoidable costs less depreciation). In the notice (41 F.R. at 31883) the Commission observed that "the present practices of the railroads and their reports to the Commission do not provide a reliable basis for determining precise allocations of working capital to branch lines," and invited specific suggestions of the parties as to the proper allowance. Iowa asserts that "over a given year the amount of capital needed to sustain branch line operations will probably fall in the neighborhood of between $2,000 and $10,000 per mile per year," but does not offer any basis for this estimate. It does urge the Commission to carefully reassess its theory in the light of the practical ramifications.

AAR estimates that 50 percent of all rail shipments are interline; that interline settlements are usually 3 months late; that the remaining shipments are settled within 30 days; and that accounts payable average a delay of 30 days in payment. It therefore suggests that 30 days of on-branch avoidable costs should be defined as allowable working capital. The Commission is not persuaded that it should adopt AAR's approach, since in some instances shipments originating on a branch, whether local or interline, will be prepaid; and in other instances terminating shipments will be collect. In either of these circumstances the carrier has almost immediate possession of the funds, and is the beneficiary of any delays in interline settlements.

In sum, the responses do not measurably improve the evidentiary basis for establishing a uniform working capital allowance for branch lines. Section 1121.43(a) therefore will become effective without revision. It may eventuate that a proper working capital allowance will vary from branch to branch, depending upon the balance of the on branch traffic as between collect and prepaid shipments, the length of the off branch haul, and other considerations. There will be opportunity to revise the allowance should experience gained in actual case-by-case abandonment proceedings demonstrate the necessity.

Deferred Tax Benefits.—Proposed section 1121.43(b) of the standards would provide for allowance in the investment base of the amount of current income tax benefits resulting from abandonment of the line which would have been applicable to the period of the subsidy agreement (this information to be furnished by the railroad and subject to audit by the person offering the subsidy). The notice (41 F.R. at 31883) contained a discussion of this item, and specifically requested comment of the parties with respect to the proposed treatment of it. The responses do not provide any substantive reason for revising section 1121.43(b).

Pennsylvania PUC and UTU:

> the carrier cannot claim both the foregone tax benefit accruing from the abandonment of the property and at the same time seek a return on the investment of the not abandoned property ***. The carrier has only two choices; abandon the line and claim the tax benefit or retain the branch and claim a return on the liquidation value of the property. In any case, the carrier cannot claim both.

We believe Pennsylvania PUC and UTU to be in error. Section 1(a)(6) of the act clearly contemplates that the carrier is entitled to be reimbursed for the avoidable costs of continuing service, including tax benefits foregone, and to receive as well a reasonable return on the value of the properties used in continuing the service. Were the carrier to abandon the line, it would realize cash from liquidation of the properties and also, depending on its tax status, certain tax benefits. If it is required to continue the service, it should be compensated for deferring the realization of these cash flows.

South Dakota asserts "there is something basically wrong with regulations that require a railroad to abandon a line before it can depreciate it for tax purposes," noting "that even the new accounting standards fail to address this problem." Although this comment should more appropriately be addressed to the proceeding in docket No. 36367, *Revision to the Uniform System of Accounts for Railroads,* we would observe that this Commission has no jurisdiction over the Internal Revenue Code or the regulations issued thereunder.

Values of the properties.—Proposed section 1121.43(c) would provide that the value of the properties to be included in the investment base should be the net liquidation value, for their highest and best use for nonrail purposes, of the rail properties on the line to be subsidized which are used and required for performance of the service requested by the person offering the subsidy. A discussion of this section is included in the notice (41 F.R. at 31883), and need not be repeated here.

AAR refers to the proposal in the office's supplemental notice (Ex Parte No. 293 (Sub-No. 2)) to amend the regional freight subsidy standards (49 CFR 1125.6—1125.7) to provide for alternative compensation resulting from arms-length negotiations. It urges that a similar provision be included in the national standards. DOT, in its response to the office's supplemental notice, recommends that the office not change the standard for determining compensation to the trustees of the bankrupt railroads for use of their properties.

As a general principle, the Commission and the office would expect to harmonize the regional subsidy standards and the national standards prescribed herein. However, there are factual and statutory differences which necessitate some variations. In large part because of litigation pending before the Special Court under section 303 of the Regional Rail Reorganization Act of 1973, the trustees of the debtor estates involved in that litigation and the subsidizing entities have been unable to reach agreement with regard to valuation of branch line properties, but may be able to agree on a reasonable alternative basis of compensation for use of the properties. No such problem exists with respect to branch line properties affected by the regulations under consideration here, and therefore, no reason is presently perceived for revision of section 1121.43(c) to accommodate alternative compensation.

Reasonable return—carriers not in reorganization.—Proposed section 1121.44(a) would provide that a carrier not in reorganization shall furnish to the Commission and to any financially responsible person considering the offer of a rail service continuation payment, a statement, with substantiation, of its current cost of capital, after adjustment for the effects of current Federal and State income taxes. The reasons for this section were discussed in some detail in the notice (41 F.R. at 31883-4), and the comments of interested parties were specifically sought.

The responses to this proposed section are in distinct contrast. Iowa concurs with the Commission's approach in establishing "the cost of capital." M-K-T fears that the standard as proposed could produce various methods of computation and many versions of its proper meaning, and urges that a specific definition and means of determination should be set forth in the proposed regulations. It recommends that cost of capital be determined by averaging the interest paid on all borrowings of the applicant over the most recent 3 calendar years. Pennsylvania PUC & UTU recommend somewhat similarly that the average annual cost of the individual carrier's outstanding bonds should be used in determining the rate of return on the value of the property for other than equipment.

AAR, on the contrary, interprets the proposed standard to exclude any consideration of return on equity, although no such exclusion is intended. It recommends that the regulations be made explicit to include "the *current* cost of debt, the *current* cost of equity capital, and the debt and equity portions of a capital structure *which the applicant should attain or preserve if it is to have a creditable* financial stature" (emphasis supplied). As a general observation, AAR construes section 1a(11) of the act to describe "what economists would term a condition of economic indifference; i.e., that the economic consequences to the carrier are the same whether service is abandoned or continued with the described subsidy." We think this is a fair interpretation.

The Commission is aware of the unsatisfactory financial and physical condition of some railroads, and is concerned that, as pointed out in the notice (41 F.R. at 31884), the railroads have not endeavored in recent years to obtain equity capital. In instances where capital structures contain undesirable ratios of debt to real equity, the reasons are undoubtedly many and varied, extending back over the years and not necessarily restricted to the effects of branch line operations. In some cases improvident dividend or other financial policies may have played a part; in others the control of the equity by parent holding companies or conglomerates may have inhibited its marketability.

To require, as AAR urges, that the subsidizers of branch lines assume the burden of rehabilitating excessively debt-heavy financial structures, regardless of the factors leading to such structures, and regardless of the financial results from other segments of the carrier's operations, would not place the abandonment versus subsidy decisions in a posture of economic indifference. Rather, it would establish an incentive for abandonments by requiring those desiring continued service to cross-subsidize the carrier's other rail operations through provision of an assured return higher than that which may be achievable in such other operations.

Section 15a(4) of the act, as amended, requires this Commission to develop and promulgate, after notice and opportunity for hearing, reasonable standards for the establishment of revenue levels adequate under honest, economical, and efficient management, to cover total operating expenses, including depreciation and obsolescence, plus a fair, reasonable, and economic profit or return (or both) on capital employed in the business. The general theories advanced by AAR, if adequately substantiated, might appropriately be considered in the proceedings to be conducted under that section, or in Ex Parte No. 271—*Net Investment—Railroad Rate Base and Rate of Return.*

The suggestion of M-K-T has considerable merit; and certainly the subsidy processes would be simplified if a uniform rule for cost of capital could be specified as applicable to all cases. However, section 1a(11)(b) of the act clearly envisages that the Commission shall determine the cost of capital for each railroad not in reorganization whenever an offer of subsidy is made, and that determination should include appropriate consideration of all capital elements, including debt and equity. Section 1121.44(a) requires the carrier to furnish such information, with substantiation, as will permit a case-by-case determination to be made.

As in the case of the working capital, it is to be hoped that as abandonment and subsidy cases proceed, more reliable information will be developed with respect to the capital needs of individual carriers. Prospective applicants should refer to the notice (41 F.R. at 31883) which describes some of the principal considerations which it is believed should enter into the cost of capital determinations.

Reasonable return—railroads in reorganization.—Proposed section 1121.44(b) would provide that, for a carrier in reorganization, the cost of capital shall be the average yield on all railroad bonds for the week immediately preceding the execution of the subsidy agreement, as quoted by any standard investors' service, adjusted for the effects of Federal or State income taxes, if any, actually incurred during the term of the agreement. AAR proposes that the standard be revised to read:

> For a carrier in reorganization, the cost of capital for the purpose of the rail service continuation payment shall be the mean cost of capital of railroads not in reorganization, after adjustment for the effects of current and deferred Federal and State income taxes. The ratio of equity capital as a portion of total capital shall be the mean ratio of all railroads and the cost of the equity portion shall be the mean cost of equity capital of all railroads. The cost of the debt portion of total capital shall be the average yield of all railroad bonds for the weeks immediately preceding the execution of the subsidy agreement, as quoted by any standard investors' service, adjusted for the effects of any Federal or State income taxes actually incurred by the carrier during the term of the agreement.

The difficulty is, as pointed out in the notice (41 F.R. at 31883) that reliable data as to the mean costs of capital for railroads not in reorganization do not presently exist. The verified statement on this subject appended to the AAR submission states "the instability of financial and market data for even the most profitable and least disadvantaged railroads is a barrier to estimates of the cost of equity and total capital," and recommends that such estimates "should proceed from benchmarks provided by financial and market data for utilities, particularly electric utilities and industrials having a greater financial stability and lesser financial risk." We are not persuaded that this analysis is altogether correct. Yields on tested railroad bonds in recent months have not compared unfavorably with those on utilities of comparable grade, and the stability of price-earnings ratios for some higher-grade railroad stocks compares quite favorably with that of many utilities, industrials, and conglomerates. The capital costs of individual utilities and industrials vary widely; properly weighted comparisons with them may be appropriate, but section 1a(11)(b) of the act clearly calls for the reasonable return to be based on the cost of capital for railroads, not that of utilities or industrials.

Admittedly, reliance on average railroad bond yields is an imperfect method for accomplishing congressional intent as to the return to be allowed on the branch line properties of railroads in reorganization. However, at present, we have no better data on which to base the standard. In the near future, only one railroad would be affected by this standard, and it seems undesirable to place upon it, or upon persons offering to subsidize its branch lines, the burden of establishing the "mean cost of capital of railroads not in reorganization" which apparently AAR cannot presently supply. As time progresses, and better data are accumulated on the mean cost of capital either through the abandonment and subsidy process or as a result of the other studies of railroad capital costs and needs now under way or to be undertaken, the standard can be revised.

Income tax effect.—Proposed section 1121.44(c) would provide that the return on investment be adjusted annually to reflect the carrier's actual current (cash) effective Federal and State income tax rate. A discussion of Federal and State income tax effects was included in the notice (41 F.R. at 31884).

AAR's position on this subject is somewhat unclear. It states that "because of the character of the taxable transactions which will occur as a result of continued operation of an unprofitable line under subsidy, the standard as proposed by the Commission is noncompensatory. To avoid this noncompensatory standard, the marginal or statutory income tax return [sic] is the appropriate return to be used ***." Apparently AAR is suggesting that the return element should contain allowance for accruals by the carrier against deferred taxes which may become payable at some time in the future.

Our disposition of this matter closely coincides with the recommendation of an industry representative, J.H. Williams, in testimony given on July 18, 1975, before the Senate Subcommittee on Surface Transportation, which was then considering legislation dealing with branch line problems. Mr. Williams proposed that "taxes *actually incurred* by operating carriers can be calculated (either after the year of subsidy or projected for it) by: (1) calculating income taxes *actually paid* for the year of subsidized operation, and, if greater than zero, (2) calculating the income taxes which the carrier would have paid if it had not operated the subsidized lines, and (3) comparing these calculations in order to calculate the income taxes *actually incurred*" (emphasis supplied) (Senate Report 94-31, 94th Congress, 1st Session, pp. 798-807).

We believe we are entitiled to rely on the views of this cost witness insofar as they are not controverted by the terms of the legislation. Witness Williams advocated allowance for income taxes actually paid during the subsidy year as compared with those which would have been paid had the service not been provided, not accruals for taxes in some future year. Section 1121.43(b) of the standards includes deferred tax benefits realizable had the line been abandoned rather than continued under subsidy (steps (2) and (3) of his recommended procedure) in the investment base on which the reasonable return is computed. Proposed section 1121.44(c) contemplates adjustment of the return for the income taxes actually paid for the year of subsidized operations (step (1)).

Capital costs associated with locomotives and freight cars.—Proposed section 1121.42(c)(4) deals with allowances for depreciation of locomotives and freight cars, and proposed section 1121.42(c)(6) and 1(3) with return on investment in such rolling stock. The discussion of the responses concerning these capital-related items is divided under three headings: (a) depreciation; (b) investment base and (c) allowable return.

(a) *Depreciation.*—AAR correctly points out that the standards calculate depreciation on the basis of an allocation of book depreciation, and it urges, in substance, that they be revised to compute depreciation as if all the equipment used on subsidized branch lines were newly purchased at the beginning of the subsidy period. Its argument is founded in part on the reference in section 1a(11)(a) of the act to "the current cost of freight cars, locomotives and other equipment," and on the following reasoning:

> The likely effect of an abandonment would be that the rolling stock released from serving a branch's customers would displace purchases of new rolling stock of similar kind and capacity. In other words, if 100 freight cars and 10 locomotives were required in order to provide continued branch line service under subsidy, cessation of that service would permit the operating carrier to avoid the purchase of 100 new freight cars and 10 new locomotives.

This Commission is aware of the problems faced by all industry in these inflationary times, in providing for the replacement of facilities and equipment acquired at lower prices than are currently prevalent; and of the arguments for adoption of "replacement cost" depreciation accounting. The Securities and Exchange Commission recently adopted regulations requiring some companies to report separately the effects of replacing facilities and equipment at current costs; it has not required the adoption of replacement cost accounting in financial statements and, so far as we are aware, no regulatory agency has adopted it for ratemaking purposes. AAR, it may be noted, has gone beyond even the "current cost of replacement in kind" theory; it would have us assume, for subsidy purposes, that all equipment furnished to branch line shippers, no matter how decrepit or obsolete, is newly acquired and modern in all respects.

Section 1a(11)(a) of the act provides that "such foregone cash inflows and incurred outflows shall include***(iii) the current cost of freight cars, locomotives and other equipments ***." Depreciation charges do not represent current cash inflows or outflows, and there is no indication that in this section Congress intended to break new ground by legislating replacement-cost depreciation accounting. The argument that abandonment of branch lines would relieve the necessity of purchasing new locomotive and cars is unpersuasive. The same effects would be achieved by failure to supply cars to main-line shippers and the equity of imposing upon branch line shippers the alternative of paying for depreciation of fictitious new equipment which they do not receive, or losing the service, is not readily apparent.

(b) *Equipment investment base.*—The investment base to which the allowable return is applied flows from the computation of original cost less accrued depreciation. DOT states that it has petitioned the Commission to institute a proceeding to evaluate the basis of valuing assets. In effect, it appears to favor the cost of reproduction new less depreciation as the basis for valuing assets, a position seemingly at variance with its views in Ex Parte No. 293 (Sub-No. 2). It concedes that such a change would require a change in the cost of capital standard, so that the inflation factor would not be reflected twice.

DOT's proposal for valuing assets would have far-reaching consequences; we believe that it would be more appropriately considered in a general proceeding involving all users of rail service, rather than a rulemaking proceeding limited to the prescription of branch line abandonment and subsidy standards.

(c) *Allowable return—equipment investment.*—Proposed section 1121.42(c)(6) and 1(3) of the standards dealt with the allocation to the branch lines of the allowable return on the railroad's system investment in locomotives and freight train cars. In each case, the return was to be computed by applying to the system net book investment in each class of equipment a rate equal to the rate of interest which applied to the latest equipment trust certificates, conditional sales agreements, or equipment lease agreements entered into by the railroad for the purchase or lease of such rolling stock.

AAR objects that these proposed standards fail to allow the operating carrier to recover its full cost of capital for rolling stock by providing only for interest on debt and not equity. It proposes no specific alternative, but urges that "the applicant's cost of capital applicable to freight cars, locomotives, and other equipment is no different than that which must be recovered by the enterprise as a whole." No substantiation is provided for this statement, which appears to be at variance with experience and observation.

Among the numerous factors entering into the cost of capital for any enterprise are the uses to which the capital is to be put, the security or collateral which can be provided, and the period of time for which the capital is committed. The effects of the latter two factors have been particularly notable in the behavior of the capital markets during recent years, when both quality and term yield spreads have fluctuated considerably. In these respects, equipment financing enjoys several advantages as compared with mortgage debt, debentures, or equity. Specifically, mobile security can be offered, and under section 77(j) of the Bankruptcy Act the equipment, as distinguished from other types of collateral, can be readily repossessed. The term of the debt is specific, usually much shorter than the anticipated useful life of the equipment; and there is usually provision for at least semiannual amortization. Also, in many instances investment tax credits which cannot be used to reduce the carrier's income taxes are employed to reduce the effective interest rate. We cannot conclude, therefore, that the cost of capital for railroad equipment is the same as the cost of other railroad capital.

AAR is correct that the railroad should receive a return on the equity in its rolling stock. The proposed standards were not intended to exclude such a return. The standards apply to the entire net equipment investment the same *rate* of return, in the belief that this would have the advantage of simplicity and minimize paper work. However, inasmuch as the rate specified is the interest rate applicable to the carrier's most recent equipment obligations, rather than the average yield on all such outstanding obligations, and the carrier's actual interest payments are deducted before computing taxable income, the result of this process would be an effective return on the equity portion of the equipment investment substantially higher than this overall rate.

DOT's reply to AAR's initial statement notes that the interest rate on the most recent equipment obligation is observable and easily checked, thereby reducing the time spent on verifying the cost of capital figure and recommends that it be retained. The proposed standards will be made effective. If any party believes that separate rates of return for the debt and equity portions of the equipment investment are desirable, and is able to propose and substantiate a reasonable basis for computing such separate rates, subsequent revision of the standards to accomplish this could be considered.

(d) *Summation—equipment.*—The foregoing discussion of the return on the operating carrier's investment in equipment has involved four issues: (1) the calculation of original cost; (2) the equipment investment base allowed (original cost less accrued depreciation); (3) annual depreciation charges; and (4) the amount of the return on the debt and equity portions of the carrier's investment. For the benefit of the parties, it may be useful to illustrate in arithmetic terms the effects of the decisions which have been reached as compared with those which would have resulted from accepting the approaches of AAR as to the treatment of equipment investment.

For this illustrative purpose, it is assumed that the operating railroad has an equipment fleet variously aged 1-40 years with an actual original cost of $200 million. Book accrued depreciation is 50 percent, or $100 million, so that the net book value is $100 million. Outstanding are $50 million of unamortized equipment obligations, with coupon rates varying from 4 percent to 8 percent, the weighted average being 6 percent. The book equity in this equipment thus is $50 million. The estimated cost of replacing all of this equipment with new, modern equipment at 1976 prices is $400 million (double the original costs). AAR proposes, in essence, that for the purposes of the abandonment and subsidy standards all of this equipment should be assumed to be newly acquired at current prices, with no accrued depreciation; and that future depreciation charges should be based on this assumption.

Column A in the following table is computed as if these contentions had been accepted; column B is based on the standards adopted. Both columns assume an overall return of 8 percent.

	Dollar amounts in millions	
	A	*B*
Original cost	$400	$200
Accrued depreciation	----------	100
Net investment	400	100
Actual outstanding equipment debt	50	50
Balance for equity	350	50
Allowed return (8 percent on net investment)	32	8
Actual interest charges at 6 percent average	3	3
Net available for equity	29	5
Return on book equity (percent)	58	10
Annual depreciation (5 percent of original cost)	$20	$10
Total annual return plus depreciation	$49	$15
Ratio return plus depreciation to book investment (percent)	49	15

Where the debt-equity ratio in column B 75:25 instead of 50:50, the return on book equity would be 14 percent; if it were 90:10, the return on book equity would be 26 percent. If the latest equipment obligation was at 9 percent and other factors remained the same, the return on 50-cent equity in column B would be 12 percent; on 25-percent equity the return would be 18 percent; on 10-percent equity, 36 percent. These variations illustrate the effects of leverage. Having considered the legislative history and the contentions of the parties, the Commission is of the view that the return on equipment, exemplified by column B, more nearly comports with congressional intent.

FINDINGS

We find that Title 49, Chapter X, Subchapter B, Part 1121 of the Code of Federal Regulations requires amendment by the adoption of the regulations accompanying this report; that such regulations are reasonable and necessary; and that they should be adopted.

An appropriate order will be entered.

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 5th day of November 1976.

EX PARTE NO. 274 (SUB-NO. 2)

ABANDONMENT OF RAILROAD LINES AND DISCONTINUANCE OF SERVICE

Investigation of the matters and things involved in this proceeding having been made and the Commission, on the date hereof, having adopted its report with respect to the regulations (embodying their determinations by the Rail Service Planning Office as provided in section 205(e)(1)(B) of the Regional Rail Reorganization Act of 1973, as amended, to determine the "avoidable cost of providing rail freight service" as that phrase is used in section 1a(6)(a)(ii)(A) of the Interstate Commerce Act, as amended), which regulations by order dated October 29, 1976, were adopted, and copy deposited with, among others, the Director, Office of the Federal Register, to be effective on November 1, 1976, are hereby referred to and made a part hereof:

It is ordered, That the referred to report be, and it is hereby, adopted as the report of the Commission.

DOCKET NO. AB-83 (SUB-NO. 2)

MAINE CENTRAL RAILROAD COMPANY, ABANDONMENT BETWEEN LIVERMORE FALLS AND FARMINGTON, IN ANDROSCOGGIN AND FRANKLIN COUNTIES, MAINE

Decided October 25, 1977

Present and future public convenience and necessity found to permit abandonment of the line of railroad between Livermore Falls and Farmington, Maine, a distance of 16.14 miles.

Eugene D. Gulland and *Scott W. Scully* for applicant.
Lore Ford III for protestant.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS BROWN, MACFARLAND, AND CHRISTIAN

BY THE DIVISION:

Exceptions to the initial decision were filed by applicant, Maine Central Railroad Company, and protestant, State of Maine (State), and both have filed replies to the other's exceptions. Our conclusions differ in part from those of the Administrative Law Judge. However, the facts stated in his decision, as modified herein, are adopted as our own, and will not be restated except to the extent necessary for clarity of discussion.

By application filed August 14, 1975, pursuant to section 1(18-20) of the act,[1] applicant seeks a certificate of public convenience and necessity authorizing the abandonment of a line of railroad between milepost 68.2 in Livermore Falls, Maine, and the end of the branch line at milepost 84.34 in the town of Farmington, Maine, a distance of 16.14 miles.

Subsequent to a hearing held in Farmington, Maine, an initial decision was issued which recommended granting a portion of the abandonment, between milepost 79.4 at East Wilton, Maine, and the end of the line at Farmington, a distance of 4.94 miles, but denying approval for abandonment of the balance of the line. The Administrative Law Judge found that with normalized maintenance the entire line would have operated at a loss of about $20,000 in 1976, and that abandonment, based on the applicant's belief that approximately 50 percent of the traffic would be retained, would increase the system's net income by $18,916. He also determined that rehabilitation costs necessitated by deferred maintenance would be on the order of $300,000 and that the line has a salvage value of approximately $242,000.

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[1] The abandonment of lines of railroad is now governed by section 1a of the act pursuant to amendment of the act by enactment of Public Law 94-210, Railroad Revitalization and Regulatory Reform Act of 1976. Section 1a provides that pending abandonment proceeding such as the instant proceeding shall continue to be governed by the provisions in effect at the time the amendment was enacted.

The Administrative Law Judge concluded, however, that partial abandonment would substantially relieve the burden upon the railroad. He determined that this decision would permit applicant to retain practically all of its present traffic, and avoid approximately 30 percent of the projected rehabilitation costs.

In its exceptions, applicant professes its agreement with the Administrative Law Judge's findings of fact, but believes those findings are inconsistent with the recommendation that applicant be required to continue operating 11.20 miles of the branch. It submits that the evidence demonstrates a need for substantial rehabilitation in contrast to little potential for increased traffic, and that the shippers on the line will not be harmed substantially by the abandonment.

The State, in contrast, urges that the Administrative Law Judge erred in granting any portion of the abandonment application, because the railroad failed to show the line is a burden on interstate commerce. The State suggests that the line operated in 1976 at a profit, based on actual out-of-pocket expenses, asserting that the Administrative Law Judge's use of normalized maintenance was incorrect. Further, the State believes that normalized maintenance of $62,434 as projected by applicant is unnecessary, based on the prior 10-year period when $30,000 per year was adequate to keep the line at FRA class II standard. Likewise, the State submits that a $302,000 expenditure for deferred maintenance is unnecessary to maintain safe operations.

The State asserts the Administrative Law Judge also erred in finding little potential traffic on the line. Moreover, it insists that abandonment would result in a heavy burden of increased costs to the present shippers on the line, as well as adversely affecting the town of Farmington.

DISCUSSION AND CONCLUSIONS

In determining whether public convenience and necessity permits the abandonment of a line of railroad, the Commission must calculate the burden of the line on the carrier and interstate commerce, and balance this with the harm to shippers and communities that would occur if the abandonment were approved. *Colorado* v. *United States*, 271 U.S. 153 (1926).

The Administrative Law Judge was incorrect in adopting applicant's position that operations over the line "resulted in the loss of approximately $200,000 per annum." This figure clearly included "normalized maintenance," rather than actual maintenance costs as an expense. Normalized maintenance costs do not fairly describe the profitability of a line, and are useful only to demonstrate the level of deferred maintenance. *Northern Pac. Ry. Co. Abandonment—Mont.*, 342 I.C.C. 1 (1970). A calculation of the lines' profitability must utilize actual maintenance expenses.

Applicant does not offer any evidence of actual profit or loss from operations over the involved line. However, the income statement constructed by the State, although not necessarily exact, is adequate to support a finding that the line did operate at a small profit in 1976.

Our inquiry does not stop here; a finding of profitability does not mandate denial of the application. *Chesapeake & Ohio Ry. Co. Abandonment*, 331 I.C.C. 889 (1967). In such a case, we must weigh the marginal profits against the needs and burden of rehabilitation and the need of the public for continued operation over the line. *Missouri-Kansas-Texas R. Co. Abandonment, Okla.*, 338 I.C.C. 728, 748.

Applicant's expert witness estimates that rehabilitation of the line would require the expenditure of $302,000, and that normalized maintenance on the line would be $62,434. The State argues that such rehabilitation is unnecessary to maintain safe operations, and that the present level of maintenance, $31,135, is sufficient to retain the line at FRA class II standard (minimum speed 25 mph). Further, the State believes the line need not be kept at a class II level in view of the light density of traffic.

Applicant's expert witness testified that 9,870 ties need to be replaced, that the ballast is unstable and washed away in places, and that joints need to be replaced, although it was stated the rail is in good condition. Maintenance has been deferred on the line for approximately 10 years. The State presented no evidence disputing applicant's position that the condition of the line requires the expenditure of $302,000. The fact that the line operates safely does not negate the need for rehabilitation. *Baltimore & O. R. Co. Abandonment Fairmont Branch*, 342 I.C.C. 751, 754 (1973). Moreover, the State's contention that it would not be harmful for the line to be permitted to drop to a class I level is unsupported by any evidence. In the absence of any such showing by opponents of the abandonment, we conclude that the rehabilitation expenditure estimated by applicant is necessary.

In contrast the record does not demonstrate that any shippers will suffer substantial harm if the abandonment is approved. The Farmington Farmers Union will have an additional cost of $27,906 to truck mostly feed grain, which it presently receives by rail, from Livermore Falls to Farmington. No evidence was offered indicating the percentage increase over current transportation costs this would represent.

Forster Manufacturing Company anticipates an additional cost of $52,942 for transportation of boltwood and styrene pellets. Presently two-thirds of the boltwood received is transported by truck from points in northern Maine. Forster does not ship any of its finished products by rail. The increase in cost represents 0.2 percent of the company's annual sales. Forster also stated it would receive between 25 and 50 additional carloads in 1977. No other shippers offered evidence in opposition.

The town of Jay, which is located on the line, indicated it was developing an industrial park and had two prospective tenants who might require rail service. No specifics were given as to possible carloadings.

The shippers on the line will surely incur inconvenience and increased transportation costs if we authorize abandonment, but these factors are not sufficient to outweigh the rehabilitation costs herein, their burden on applicant and interstate commerce. The evidence shows a steady decrease of carloads over the past 4 years, from 738 in 1973 to 465 in 1976. The record fails to demonstrate any significant potential traffic to justify the needed rehabilitation, or serve as a basis for recoupment if such expenditures are required.

Moreover, the alternative adopted by the Administrative Law Judge, permitting abandonment of only 4.94 miles of the line, does not alleviate the burden on interstate commerce from continued operation of this line. The record does not support the conclusion that abandonment of the northern portion will reduce rehabilitation costs by one-third, nor is there any basis to conclude that this will permit retention of all traffic. Further, in our opinion, even if the record did support these findings, the future needs of the region do not justify the expenditure of $200,000 for rehabilitation of the portion of the line that the Administrative Law Judge did not authorize to be abandoned.

The State prays that, if the abandonment is approved, any real estate owned by applicant on which is situated a building or facility owned by an individual or corporation be sold to the owner for its assessed valuation. The State offers no basis for its request. We believe imposition of such a condition to be unwarranted. The assessed valuation may well bear little relationship to the actual value of the real estate. The act permits us to impose reasonable conditions required by public convenience and necessity. Giving certain unspecified interests a windfall and depriving the railroad of the value of its property are not proper bases for exercise of this power.

In our report in *Oregon Short Line R. Co.—Abandonment—Goshen*, 354 I.C.C. 76 (1977), we concluded that in all pending abandonment proceedings filed prior to November 1, 1976, the labor protection to be imposed is that enacted in and developed pursuant to section 405 of the Rail Passenger Service Act. Accordingly, the findings of the Administrative Law Judge will be modified in this respect.

The parties are advised that this decision is administratively final under the provisions of section 17(9) of the Interstate Commerce Act. Any further administrative appeal can be entertained only under section 17(9)(d) of the act which permits such an appeal only if the entire Commission finds that a matter of general transportation importance is involved, that clear and convincing new evidence has been presented, or that there exists changed circumstances which would materially affect the decision made herein. Such appeal must be filed within 20 days of the date of service of this report.

We find that, subject to the labor protection conditions enacted in and developed pursuant to section 405 of the Rail Passenger Service Act, the present and future public convenience and necessity permits abandonment by the Maine Central Railroad Company of its branch line between Livermore Falls and the town of Farmington, Maine, as hereinbefore stated, a distance of 16.14 miles.

An appropriate order will be entered.

COMMISSIONER MACFARLAND did not participate.

READEX FICHE best copy available

FINANCE DOCKET NO. 28583[1]

BURLINGTON NORTHERN, INC.—CONTROL AND MERGER—ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

Decided November 11, 1977

Petition for waiver and/or clarification of ICC Railroad Acquisition, Control, Merger, Consolidation, Coordination Project, Trackage Rights and Lease Procedures, 42 F.R. 14871 (to be codified in 49 CFR 1111) and F.R. Revised Rules of Practice, 42 F.R. 23806 (to be codified in 49 CFR 1100).

D. E. Engle and *Eric A. Cunningham, Jr.*, for St. Louis-San Francisco Railway Company.

Frank S. Farrell and *Byron D. Olsen* for Burlington Northern, Inc.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Burlington Northern, Inc. (BN), and the St. Louis-San Francisco Railway Company (Frisco), filed a petition on October 17, 1977, pursuant to section 1100.99, *Petitions Not Otherwise Covered*, of the ICC *Revised Rules of Practice*, 42 F.R. 23806 (to be codified in 49 CFR 1100.99), hereinafter called the Rules of Practice, seeking waiver of certain of the Commission's regulations. The petition was filed in light of the plan to file an application under section 5(2) of the Interstate Commerce Act (act) for authority to merge Frisco into BN. Specifically, BN and Frisco, jointly referred to as petitioners, seek (1) waiver of the specific requirements of section 1111.2(b)(3) of the ICC Railroad Acquistion, Control, Merger, Consolidation, Coordination Project, Trackage Rights and Lease Procedures, 42 F.R. 14871 (to be codified in 49 CFR 1112(b)(3), hereinafter referred to as the Consolidation Procedures, (2) waiver of the specific requirements of section 1111.2(b)(1)(i) of the Consolidation Procedures, (3) clarification of section 1111.1(d)(4) of the Consolidation Procedures, and (4) waiver of section 1100.13 of the Rules of Practice. For clarity and ease of understanding each waiver request will be considered separately.

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[1] A copy of this report and order will be filed in Ex Parte No. 282 (Sub-No. 1) Railroad Consolidation Procedures.

This petition has been filed prior to the filing of the application under section 5(2) of the act so that the BN and Frisco will be certain that the exhibits they present in their application, and the format of these exhibits, insofar as considered in our decision, will meet the requirements of the Consolidation Procedures and Rules of Practice. This is not to be taken as saying that the application will be automatically accepted. It will still be the subject of our close scrutiny to insure that the application *in toto* complies with the Consolidation Procedures in order for us to decide whether to accept or reject the application within 30 days of the date of filing as provided in section 5(2)(g)(i) of the act. However, we believe this petition, and any future petitions of this nature, are a benefit to both the carriers and ourselves in the expeditious handling of railroad consolidations. Therefore, we invite petitions for waiver and/or clarification of the Consolidation Procedures and any of our related regulations to be filed prior to the filing of the application under section 5(2) of the act.

We will now turn to the merits of the BN-Frisco petition.

INFORMATION REQUIRED FOR THE EXHIBIT A-15 TRAFFIC STUDY

BN, Frisco, and BN's subsidiaries the Colorado and Southern Railway Company (C&S) and Fort Worth & Denver Railway Company (FW&D) sampled all 1976 traffic movements. Petitioners claim that the sample was taken in accordance with the Bureau of Economics, Interstate Commerce Commission Guidelines for the Presentation of the Results of Sample Studies (1971). The following table describes the sample results:

Traffic study results

Carrier	Sample	Total cars in study	Total cars-possibility of diversion	Total cars-no possibility of diversion
	Percent			
BN	1	23,829	3,303	20,526
Frisco	1	7,915	4.168	3,747
C&S	5	2.176	406	1,770
FW&D	5	4,799	815	3,984
Total	----	38,719	8,692	30,027

BN, Frisco, C&S, and FW&D point out that they are prepared to present complete waybill data for all 38,719 movements, as required by section 1111.2(b)(3)(ii) of the Consolidation Procedures. However, they believe that presentation of complete waybill data for the 30,027 movements for which no possibility of diversion exists is unnecessary since: (1) a sample could have been taken of only the traffic which could be affected by the merger, which would not have included noninvolved traffic; (2) the noninvolved traffic is irrelevant to a determination of the impact of the proposed merger since it involves traffic not susceptible to change from the proposed merger (see appendix A for examples); (3) the waybills and other underlying information have not been drawn from the files, procurement of such data would require 3,115 person hours, and the information from these exhibits would be of no value in the proposed merger proceeding; (4) each set of abstracts will consist of 85 volumes approximately 15 feet high for the 8,692 movements with a possibility of diversion, but would be 379 volumes approximately 63 feet high for all 38,719 movements; and (5) production of data for all 38,719 movements will destroy the confidentiality of a larger spectrum of traffic for no worthwhile purpose. BN, Frisco, C&S, and FW&D propose that, in lieu of submitting complete waybill data for the 30,027 movements not subject to diversion, they will submit a computer printout containing sufficient information on these movements for anyone to determine the possibilitity of diversion of the movements. See appendix B for a listing of the information which is proposed to be provided.

Hence, BN, Frisco, C&S, and FW&D request the Commission require complete waybill data for only those 8,692 movements studied for which a possibility of diversion exists.

Discussion and Conclusions

We see merit in granting the waiver requested.

The purpose of the traffic study is to estimate gains in traffic and revenue expected to result from consummation of the proposed transaction. This information will permit us to determine the competitive effect of the proposed merger on other carriers, and assist us in invoking conditions to lessen any adverse competitive effects. The information we require in the traffic study is the complete data shown on the waybills, and all other information regarding the movements relied upon for determining the gains in traffic and revenue. Further, this information must be furnished on all study movements whether or not a gain has been determined.

We anticipated that the carriers would segregate their traffic movements into relevant and nonrelevant groups prior to drawing the sample. It was then foreseen that a sample would be taken from the relevant group only, resulting in a relatively small number of movements to be studied. In this way, all traffic which could not be involved in longer hauls, *e.g.*, local traffic, would be excluded from the sample. However, the subject petition has revealed that BN, Frisco, C&S, and FW&D using a different statistical procedure, collected a percentage of *all* traffic movements and *then* eliminated those movements which they considered not to be relevant to the proposed application. The prospective applicants then studied in detail only the remaining (relevant) movements, and have proposed that the abstracts of study movements required in exhibit A-15 contain only the relevant movements. All excluded movements (nonrelevant) would be produced in a separate computer printout for the purposes of identification and of providing the parties a means of determining in their opinion which, if any, of such excluded movements should have been considered relevant movements.

The BN, Frisco, C&S, and FW&D have indicated that the movements excluded from detailed study were determined on the basis of limited data, primarily data showing that the movements were local to their lines or were clearly geographically removed from any possible rerouting resulting from the proposed transactions. Petitioners have assured us that the excluded movements could be provided in the abstract showing complete data as required in the Consolidation Procedures. Obviously, production of the material would result in a staggering amount of predominantly irrelevant documents, a situation the Consolidation Procedures are specifically designed to avoid.

Petitioners will be permitted to file traffic studies as outlined in their petition. The fact that the carriers used a procedure that selected the desired percentage of all waybills in order to secure the sample is within standard statistical practice. In general, technically both the procedure of segregating all waybills to sample the relevant population and the procedures of selecting from all waybills to segregate into sample and nonsample are equally statistically sound. This assumes that each procedure is carried out correctly.

Clearly, a judgement was made to the effect that the excluded movements were nondivertible by reason of nonrelevance. The remaining "*study* movements" were then considered as diversion possibilities, and complete data were obtained on each "study movement," to make the judgement of gain or no-gain on each. These latter judgments are the ones contemplated under the Consolidation Procedures. The "study movements" as defined above, then, should be reproduced in strict accordance with the Consolidation Procedures.

It is highly likely that some parties of the Commission itself may be of the opinion that certain movements should have been included in the actual study movements group. For this reason, reproduction of the data utilized to make the initial judgement is a necessary requirement for traffic studies which are based on a sample of *all* traffic.

The reproduction as the prospective applicants here offer, will be in the form of a computer printout showing the data for each movement, as set out in appendix B. Further, the complete data, including that shown on the waybills, for these movements shall be available at the headquarters of BN, and shall be made available to the Commission on request, and to interested parties on request who can show a legitimate interest in the movements. This information is not available for "fishing expeditions."

We are permitting this in order to foster the expeditious handling of the proposed transaction within the time limits of section 402 of the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law No. 94-210 (4R Act). Since we adopted the Consolidation Procedures to meet these statutory deadlines, we believe this waiver will advance those ends. There is a public purpose served in only requiring the submission of information relevant to the determination to be made, particularly when such requirement saves both the time and other resources of all involved parties.

In summary, we are requiring BN, Frisco, C&S, and FW&D to file a traffic study meeting the informational requirements of section 1111.2(b)(3)(ii) of the Consolidation Procedures for the 8,692 movements in which there is a possibility of diversion. Additionally, BN, Frisco, C&S, and FW&D are required to file a printout of the remaining 30,027 movements containing sufficient information to determine divertibility, including at least the information contained in appendix B. Further, BN, Frisco, C&S, and FW&D shall have available and present to the Commission upon request the data for these 30,027 movements required by section 1111.2(b)(3)(ii) of the Consolidation Procedures.

INFORMATION REQUIRED FOR THE EXHIBIT A-13, TABLE B

Petitioners also request a modification of the requirements of section 1111.2(b)(1)(ii) of the Consolidation Procedures relating to the information to be contained in table B of exhibit A-13. Petitioners state that table B requires that applications show for each connecting line-haul carrier at each major interchange point (a point which handled more than 5,000 revenue carloads during the latest calendar year) the annual carloads handled between each origin-destination State pair. Petitioners point out that any large railroad will handle a few isolated movements to nearly every State origin-destination combination via any given interchange. Petitioners see no reason to file this information where less than 100 revenue carloads per year per connecting carrier are involved since table B would be 775 pages, and is included in every copy of the application.

Petitioners argue that State pairs with low traffic volumes (under 100 revenue carloads per year per connecting carrier) are in the nature of aberrations and not representative of the information sought by the Commission or interested parties.

Therefore, in order to limit the cost of printing and distributing the application, in order to control the volume of the application by reducing the length of table B to 200 pages from 775 pages, and since traffic volume of less than 100 revenue carloads per year is of little significance to anyone in this proceeding. BN and Frisco request permission to limit the State-to-State pairs to be shown in table B to those which involve a traffic volume of 100 or more revenue carloads per year per connecting carrier. BN and Frisco state that they are prepared to supplement the copies of table B to be filed with the Commission with complete information.

DISCUSSION AND CONCLUSIONS

There is a three-fold purpose in requiring the information in exhibit A-13, table B. First, the information provides a useful comparison for data produced in traffic diversion studies. This information can also be used to delineate the markets in the territory immediate to the applicants' lines, and those markets beyond the region served. Finally, exhibit A-13, table B can be used to document complex competitive issues that might arise. See *Railroad Consolidation Procedures,* 348 I.C.C. 771, 792 (1977).

As noted in the petition, petitioners have approached the Commission informally regarding the proposed waiver. Although the request was declined at that time, we now have the perspective of having considered the request in the intervening time, and the opportunity to study an example table B filed with the recently filed application in Finance Docket No. 28575, *Norfolk and Western Railway Company—Trackage Rights—Over the Baltimore and Ohio Railroad Company and the Baltimore and Ohio Railroad Company in Pennsylvania located in Fayette and Westmoreland Counties, Pennsylvania.*

As a result of our reflection on the matter and our examination of the Norfolk and Western Railway Company's exhibit, we are convinced that BN and Frisco have presented sound reasons for eliminating movements of less than 100 cars per year per connecting carrier from table B of exhibit A-13. While the granting of the request could modify the Consolidation Procedures, this is not our intention. We are merely granting petitioners a waiver of section 1111.2(b)(ii) of the Consolidation Procedures, as it relates to less than 100 revenue carloads per year per connecting carrier in exhibit A-13, table B. We do not modify the Consolidation Procedures, because in future proceedings 100 revenue carloads per year for each pair of origin and destination States for each connecting carrier may well be relevant to carriers smaller than petitioners, particularly since this exhibit is for the purpose, among others, of delineating markets served by petitioners. Further, we believe that any modification of the Consolidation Procedures should be in a separate proceeding, after we have had additional experience under them.

Hence, we waive the requirement of section 1111.2(b)(1)(ii) of the Consolidation Procedures, only in this proceeding, so as *not* to require inclusion in exhibit A-13, table B of those origin and destination State movements of less than 100 revenue carloads per year per connecting carrier.

IDENTIFICATION OF SUBSIDIARIES AND AFFILIATES

Petitioners point out the section 1111.1(c)(8-10) of the Consolidation Procedures require the disclosure of intercorporate relationships between applicants, other carriers, and the holding companies of carriers. Petitioners then explain that they do not believe any portion of the Consolidation Procedures require disclosure of relationships with noncarriers, even though section 1111.1(d)(4) of the Consolidation Procedures requires disclosure of relationships not previously disclosed in responses to prior questions. In light of their interpretation of the Consolidation Procedures, petitioners request that noncarrier subsidiaries and affiliates need not be listed as part of an application filed pursuant to section 5(2) of the act, and the Consolidation Procedures.

Discussion and Conclusions

We disagree with the interpretation of section 1111.1(d)(4) of the Consolidation Procedures proposed by BN and Frisco. This Commission needs timely information on ownership and control to help identify possible conflicts of interest, misuse of insider information, exertion of undue influence facilitated by concentration of control, and other possible problems contrary to the public interest. *Corporate Disclosure Regulations,* 354 I.C.C. 27, 29 (1977). Additionally, every regulatory agency should have, on a current basis, a detailed description of the structure and activities of companies subject to its jurisdiction and that description should logically include information that reveals who owns or controls the company and what the company itself owns or controls. *Id.* at 30-31. Clearly, our policy has evolved to the point where our interest is in all relationships a carrier has with any other business entity. This is not only to insure that the carrier does not abuse its common carrier privilege, but also to insure that the carrier is not abused by a member of its corporate family, and thereby unable to perform its common carrier duties to the public.

Having enunciated our policy, we now turn to petitioners' specific question. It is apparent from the position taken by BN and Frisco, that section 1111.1(d)(4) of the Consolidation Procedures is capable of misinterpretation. The information we require pursuant to section 1111.1(d)(4) of the Consolidation Procedures is the disclosure of all subsidiaries, affiliates, and holding companies, regardless of whether such companies are considered carriers.

Therefore, the petitioners request to disclose only relationships with carriers is denied. BN and Frisco, and any other party filing an application pursuant to section 5(2) of the act, and the Consolidation Procedures, are directed that a complete application will be deemed to have been filed only if the previously described relationships are disclosed.

DOCUMENT SIZE

Petitioners request a waiver of section 1100.13 of the Rules of Practice which relates to the physical format of pleadings filed with the Commission. Specifically, petitioners seek exemption from the width requirement of 8 1/2 inches.

Petitioners point out that there are many exhibits, *e.g.*, statistical tables, which would be difficult to reduce to an 8 1/2 by 11 inch page and provide the required information and margins. Petitioners believe that a document larger than 8 1/2 by 11 inches is acceptable, so long as it can be easily folded to those dimensions and still be bound along the left margin.

Therefore, petitioners propose, (1) to limit all documents filed in the proposed application to the maximum extent possible to an absolute height of 11 inches, and (2) to fold all documents wider than 8 1/2 inches to that width, with no documents in excess of 22 inches in width, so that they can be folded and unfolded without disturbing the binding along the left margin.

DISCUSSION AND CONCLUSIONS

We agree with BN and Frisco that certain documents cannot be condensed to 8 1/2 by 11 inches. Therefore, for the reasons stated by petitioners, we approve their proposed physical format for filing the application. This is to be taken as neither a carte blanche to deviate from the requirements of section 1100.13 of the Rules of Practice, or as an acceptance of this portion of the proposed application.

We also believe that this exception should not apply to those portions of the proposed application which will be in narrative format. We must further warn petitioners that this application, either folded or unfolded, must be easily legible, or it may face rejection.

GENERAL

We cannot overemphasize the importance of petitions, such as the one we have dealt with here, being filed. In this difficult area of railroad consolidations, with such complex and far-reaching economic ramifications, we welcome any petitions such as this one which enables the involved carriers and ourselves to expedite these proceedings.

Parties which believe that they may be adversely affected by the grant of the petition will have the opportunity at prehearing conference to request that the application be modified and/or supplemented.

In order to notify the public of our decision, this report and order will be published in the Federal Register.

We find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

COMMISSIONER MACFARLAND did not participate.

APPENDIX A

The following are examples of car movements which BN and Frisco contend are not subject to diversion:

Grain from Montana and North Dakota to terminal markets in Minnesota.

Grain from interior Washington and Oregon to the Pacific Northwest.

Traffic bridged, between British Columbia/Alberta and California.

Iron ore from interior Minnesota points to Lake Superior parts.

Woodchips moving wholly within the Pacific Northwest.

Intrastate movements of sugar beets in Montana, Minnesota, and North Dakota.

Coal movements intrastate in Montana and Illinois and from the Montana-Wyoming coal fields to Minnesota and Illinois (coal shipments into the Southwest were included in the traffic studied).

Freight forwarder, shipper association, and similar shipments from Chicago to Denver and the Pacific Northwest.

Traffic between California and the Pacific Northwest.

APPENDIX B

Information to be provided for car movements for which petitioners allege there is no possibility of diversion:

Type of traffic—local, forwarded, received, or middle line.

Month in 1976 taken into account.

Abstract strata—study road revenues greater than $10,000 or study road revenues less than $10,000.

Sample number.

Station and State of origin.

Station and State of destination.

Five digit STCC code and alphabetic description.

Transit shipment.

Number of cars.

Tons.

Total freight revenue.

Full route and revenue proportions—origin road (AAR code) origin road's proportion of revenue, first junction, delivering carrier, delivering carrier's proportion of revenue.

Accounting document identification—type of traffic code, settling road, origin road, and origin road station number.

Lead waybill date (month and day).

Lead waybill number.

Study road—BN, C&S, FW&D, or Frisco.

Lead car.

ORDER

FINANCE DOCKET NO. 28583

BURLINGTON NORTHERN, INC.—CONTROL AND MERGER—ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

Investigation of the matters and things involved in this proceeding having been made and the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is made a part hereof.

It is ordered, therefore:

1. The petition is granted to the extent set forth in the report.
2. Public notice of our action herein shall be given to the general public by delivery of a copy of this report and order to the Director, Federal Register, for publication therein.
3. This order shall be effective on the date of service.

Decided November 11, 1977.

FINANCE DOCKET NO. 28599[1]

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—TRACKAGE RIGHTS—OVER THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

Decided November 21, 1977

Petition for waiver and/or clarification of ICC Railroad Acquisition, Control, Merger, Consolidation, Coordination Project, Trackage Rights and Lease Procedures, 49 F.R. 14871 (to be codified in 49 CFR part 1111).

Louis T. Duerinck for Chicago and North Western Transportation Company.

REPORT OF THE COMMISSION

BY THE COMMISSION:

On October 10, 1977, a petition was filed by Chicago and North Western Transportation Company (CNW) seeking a waiver of the apparent requirement, in footnote 1 to the regulation to be codified in 49 CFR 1111.1, as recently adopted by this Commission in *Railroad Consolidation Procedures,* 348 I.C.C. 771, 801 (1977) (Regulations), that *all* carriers with properties directly involved must be applicants for approval of any trackage rights agreement.

As part of substantial urban renewal project in Iron Mountain, Mich., a project in which there is participation by the Federal Government, the State Government, the city of Iron Mountain, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee Road) and itself, CNW is required to obtain trackage rights over 1.3 miles of the right-of-way of the Milwaukee Road. CNW notes that footnote 1 to section 1111.1 of the Regulations appears to require the application for trackage rights to include as much information for the railroad granting the trackage rights (Milwaukee Road) as for the carrier obtaining the rights (CNW). CNW argues that the requirement would be unusually and unnecessarily cumbersome for such a small application and requests that Milwaukee Road not be required to be an applicant in the contemplated proceeding.

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[1] A copy of this report and order will be filed in Ex Parte No. 282 (Sub-No. 1), Railroad Consolidation Procedures.

Prior to adoption of the new Regulations, the carrier owning the tracks had not been required to be and was not considered to be, an applicant in a trackage rights proceeding. Thus, the issue raised by petitioner is whether, in adopting the new Regulations, we intended to alter this longstanding practice.

As stated in the Notice of Proposed Rulemaking and Order served May 28, 1976, in Ex Parte No. 282 (Sub-No. 1), the revision of the railroad consolidation procedures was necessitated by the enactment of sections 5(2)(g) and 5(3) of the Interstate Commerce Act in the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Public Law 94-210. Section 5(2)(g) imposes strict time limits on the Commission's processing of all rail consolidation proceedings, and section 5(3) provides an expedited procedure for handling railroad consolidations and requires that the Commission act in an even shorter time than required under section 5(2). The Conference Committee reports to both the Senate and the House of Representatives clearly state that, except for its time limitations, the new statutory merger procedures were not intended to affect the standards or case law then utilized by the Commission under section 5(2). *S.Rep. No. 595,* 94th Cong., 2d Sess.174 (1976); *H. R. Rep. No. 781,* 94th Cong., 2d Sess. 174 (1976). Our primary purpose in revising the railroad consolidation regulations was to identify the information normally relevant to the consideration of the three categories of railroad consolidation proceedings set forth therein, and to provide for submission of that information, in a uniform manner, as early in the proceeding as possible.

In considering the question raised by petitioner, it is useful to delineate the additional information that would be required of the carrier owning the trackage were it to be considered as a necessary party applicant. Section 1111.1(b) of the Regulations requires an identification of each applicant, including the legal form in which it conducts business, the States in which it operates, the operating authority granted to it by this Commission, and whether it is affiliated with a motor or water carrier subject to the Interstate Commerce Act. Under section 1111.1(c), each applicant must also describe its organizational structure and powers, any controlling corporation, any controlled carriers, its multicorporate system and intercorporate relationships, any officers or directors in common with other applicants, and its outstanding capital stock structure. Each applicant is also required by section 1111.2(a) to submit copies of the legal documents under which it is organized, its two previous annual reports, evidence of authorization for the proposed transaction, opinion of counsel as to the legality of the transaction, a map of the applicant's system, all contracts pertaining to the transaction, and any employee agreements entered into as a result of the transaction. Finally, in compliance with section 1111.2(d)(2) of the Regulations, the general balance sheets of the applicant and the applicant's parent company, on a corporate entity basis, must be submitted.

The Regulations distinguish between an ordinary trackage rights application and one involving a major market extension, with additional traffic information being required for the latter. In making the distinction, we recognized that a transaction could be structured in the form of a trackage rights agreement yet have many of the same characteristics and consequences normally associated with a control or merger transaction. For those trackage rights applications involving a major market extension, the information required of a track-owning carrier if considered an applicant is clearly as relevant to that proceeding as it would be in the more traditional control or merger application.

However, in the context of an ordinary trackage rights proceeding (one not involving a major market extension), the information that would be required of a track-owning carrier, were it to be considered a necessry applicant, would be of only limited relevance to the issues to be considered. The necessary description of the transaction, including the contracts between the carriers, must be submitted by the carrier obtaining the trackage rights. The carrier owning the tracks is compensated for their use, and the information necessary to compute and evaluate the fairness of the compensation is contained in the contracts and other descriptive information. Further information should not be required of the track-owning carrier since its operations and net revenues are not ordinarily substantially impacted by the trackage rights arrangement. The arrangement primarily affects the carrier obtaining the rights. Thus, considering the minimal relevance of the information to be acquired, we agree with petitioner that to require the carrier owning the tracks to be a necessary applicant in an ordinary trackage rights proceeding would be burdensome.

In drafting the new Regulations, we sought to encompass in a uniform set of requirements a wide variety of transactions permissible under section 5 of the Interstate Commerce Act. We endeavored to construct requirements that would be concise, clear, and complete. We further attempted to reflect the probable competitive and market impacts of various transactions in the amount and type of information required to be filed in each application. We also realized that as we gained familiarity with the new Regulations through their use, we would see the need for their further refinement.

In the new Regulations, we made distinction, for the first time, between an ordinary trackage rights application and one involving a major market extension. As stated above, we recognized that a trackage rights arrangement could be constructed to achieve a major market extension and, in such a case, should be treated in the same manner as a more traditional control or merger transaction. Therefore, we specifically intended to require the track-owning carrier to be a necessary applicant in a trackage rights proceeding involving a major market extension. However, in adopting the new Regulations we did not intend to change our prior position that only the carrier obtaining the trackage rights is a necessary applicant in an ordinary trackage rights application (one not involving a major market extension). Through our inadvertence, the language of footnote 1 to section 1111.1 indicates otherwise. We will not require adherence to that language for ordinary trackage rights proposals, but will grant the requested waiver. Concurrently, we will modify footnote 1 to exclude trackage rights proposals not involving a major market extension.

We find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

ORDER

FINANCE DOCKET NO. 28599

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—TRACKAGE RIGHTS—OVER THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

We have investigated and considered the matters involved in this proceeding and on this date have filed a report containing our findings of fact and conclusions. That report is incorporated in this order.

It is ordered, That, the petition is granted as explained in the report. This order shall be effective on the date served.

Decided November 21, 1977.

ORDER

EX PARTE NO. 282 (SUB-NO. 1)

RAILROAD CONSOLIDATION PROCEDURES

We have considered the record in this proceeding. We have also taken notice of our action on the petition filed in Finance Docket No. 28599 seeking a waiver of the requirement, in footnote 1 to the regulations adopted in this proceeding in our report and order of January 28, 1977, (348 I.C.C. 771 at 801), indicating that *all* carriers with properties directly involved in the proposed transaction must be applicants in an application for approval of a trackage rights agreement, even those not involving a major market extension. In Finance Docket No. 28599, we observed that in the past it has not been the practice of this Commission to require that a carrier owning the tracks over which rights are to be acquired by another rail carrier, and not seeking trackage rights in its own behalf, be a necessary applicant in the application seeking approval of the trackage rights agreement. We determined that, by amending the trackage rights application procedures in this proceeding, we had not intended to alter prior practice in that regard with respect to trackage rights applications not involving major market extensions. In view of that conclusion, we believe that footnote 1 to the regulations previously adopted in this proceeding should be amended. A more complete explanation of this policy is contained in our report and order served December 7, 1977 in Finance Docket No. 28599.

It is ordered that:

1. This proceeding is reopened for further consideration, on the present record, of our report and order of January 28, 1977, only insofar as it adopted footnote 1 to amended part 1111 of Title 49 of the Code of Federal Regulations, the text of which is set forth at 348 I.C.C. 801.

2. Footnote 1 to part 1111 of Title 49 of the Code of Federal Regulations is amended by inserting an additional sentence after the final sentence, as follows:

In applications for trackage rights that do not involve a major market extension, as that term is used in section 1111.2(d), the term "applicant" shall not refer to a carrier that would be considered an applicant solely because it owns the trackage over which another carrier seeks the right to operate.

3. This order shall become effective on the date of service.

4. Notice of this order shall be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing a copy with the Director, Office of the Federal Register.

Decided November 21, 1977.

Finance Docket No. 28322[1]

CHICAGO SOUTH SHORE AND SOUTH BEND RAILROAD DISCONTINUANCE OF ALL PASSENGER TRAIN SERVICE

Decided February 8, 1978

Petition for administrative review, filed October 17, 1977, found to involve issues of general transportation importance and denied on merits.

Report of the Commission on Reconsideration

By the Commission:

On October 26, 1976, Chicago South Shore and South Bend Railroad (South Shore) filed a notice under section 13a(1) of the Interstate Commerce Act (act) proposing to discontinue all of its passenger service between South Bend, Ind., and Chicago, Ill., effective December 8, 1976. South Shore simultaneously filed an application to abandon trackage rights over 14.2 miles of track owned by Illinois Central Gulf Railroad (ICG) between Randolph Street and Kensington (115th Street) in Chicago. The abandonment application was required since the discontinuance of passenger service would end all South Shore service over the ICG track.

By order served November 23, 1976, the Commission instituted an investigation of the discontinuance and ordered passenger service to be continued for 4 months beyond the proposed effective date. Hearings were held and the record was certified to Division 3 for decision.

By report and order served April 7, 1977, Division 3 ordered South Shore to continue its passenger service for 10 months. It also granted the abandonment application conditioned upon the prior lawful discontinuance of passenger service.

By order served September 26, 1977, Division 3, Acting as an Appellate Division, vacated that portion of the earlier decision which conditionally granted the abandonment. The abandonment application was dismissed without prejudice to refiling when a future discontinuance notice might be filed.

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[1] This report also embraces docket No. AB-136, Chicago South Shore and South Bend Railroad Abandonment of Line Over The Illinois Central Gulf Railroad Between Randolph Street and 115th Street (Kensington) in Cook County, Illinois.

A petition for administrative review under section 17(9)(d) of the act was filed October 17, 1977, by the Illinois Commerce Commission, the State of Illinois, the city of Chicago, John W. McGinness, George B. Lee, and Robert D. Fritz. Petitioners allege that a matter of general transportation importance is involved because two issues were wrongly decided. In a reply filed November 7, 1977, South Shore argues that the prior order merely followed a long line of Commission decisions regarding the interaction of sections 1(18) and 13a(1) of the act.

The issues raised by petitioners present legal questions which are of concern to all railroads providing passenger service over both their own tracks and those of other railroads pursuant to trackage rights agreements. We conclude that a matter of general transportation importance has been presented and the petition seeking administative review is granted.

JURISDICTION UNDER SECTIONS 13a(1) AND 1(18)

Petitioners' first issue is:

> Whether a railroad may effectively invoke the jurisdiction of the Commission under section 13a(1) by notice to discontinue all passenger train service over a given line of railroad, where the only operation by the carrier over the involved line is the passenger train service noticed for discontinuance.

South Shore operates passenger service between South Bend and Chicago. Between South Bend and Kensington, it operates freight and passenger service over its own tracks. Over the 14-mile segment between Randolph Street and Kensington, South Shore conducts passenger service only, pursuant to an agreement with ICG, the owner of the trackage. Division 3 determined that there is concurrent jurisdiction under sections 1(18) and 13a(1) over the termination of passenger service on the 14 mile segment.

Petitioners argue that *Lehigh V. R. Co. Discontinuance of Passenger Operations*, 307 I.C.C. 239 (1959), is not applicable, since freight and passenger service would continue to be operated over the line in Lehigh Valley, whereas no service would be operated by South Shore over the 14 mile segment. However, *Lehigh Valley* was cited in the prior order not as support for the finding of concurrent jurisdiction, but for the statement that section 13a(1) extends to the discontinuance of all passenger service. Taken in context, the citation was proper.

Petitioners maintain that section 13a(1) may be invoked only when the carrier's discontinuance "rights" are subject to State law. They argue that, since the 14-mile segment is subject to Federal rather than State law (because an abandonment is involved), section 13a(1) cannot be invoked to discontinue all passenger service over that segment. Petitioners' argument considers the 14-mile segment by itself and assumes that the "rights" of the carrier to discontinue service over all portions of the route must be subject to State law. Their argument is inconsistent with the language of section 13a(1) and the intent of Congress.

Section 13a(1) provides that if the rights of any carrier with respect to the discontinuance, in whole or in part, of the operation or ***service of any train,*** operating from a point in one State to a point in another State, are subject to the laws of ***any State,*** the carrier may invoke section 13a(1) and present the matter to the Commission. (Emphasis added.) Thus, section 13a(1) expressly encompasses the full South Shore passenger service from South Bend to Randolph Street. Furthermore, under the terms of the trackage rights agreement, South Shore cannot conduct local passenger service over the 14 mile segment; passengers must board or disembark at some point beyond that segment. Operations over the segment cannot be viewed separately.

Petitioners incorrectly assume that the carrier's rights to discontinue service over all portions of the route must be subject to State law. Section 13a(1) applies when the rights of a carrier to discontinue an interstate train are subject to the laws of *any State.* The laws of only one State need apply, even though the train necessarily operates in at least two States. Adverse action by a single State could effectively block the discontinuance of a multistate passenger train. Our interpretation is supported by the following passage from the legislative history of the Transportation Act of 1958.

> Under the act, the Interstate Commerce Commission has jurisdiction over the complete abandonment of a line of track. The discontinuance or change of schedules of trains (without complete abandoning of the line of track over which they oeprate) however, is subject to the jurisdiction of the interested States. Such local regulation of what has come to be a national problem has hampered the railroads from making some changes in their passenger train operations in line with changes in patronage, and has contributed greatly to the passenger deficit. Witnesses have not suggested that all State commissions have taken obstructive attitudes, but only that it has proved impossible to secure necessary relief in some States.
>
> Because of this delay in authorizing, or absolute refusal to authorize, discontinuance of little-used services, it is proposed to add a new section 13a to the act, whereby the railroads, at their option, may have the Interstate Commerce Commission, rather than

> State commissions, pass upon the discontinuance or change in the operation or service of any train or ferry. 1958 U.S. Code Congressional and Administrative News, p. 3468.

Here, the fact that the 14-mile segment is subject to Federal abandonment authority does not alter the power of the States of Indiana and Illinois to effectively block the discontinuance by exercising their powers over the service subject to their respective authority. Thus, South Shore had the right to invoke the Commission's jurisdiction under section 13a(1).

Petitioners further argue that section 13a(1) cannot apply where an abandonment is involved, since section 13a(1) is a self-executing statute. Under that section, if the Commission does not institute an investigation, the discontinuance becomes effective automatically. Petitioners argue that in enacting section 13a(1) Congress did not intend abandonments filed under section 1(18) to become effective without further proceedings.

Although the self-executing nature of section 13a(1) does present a potential problem in those cases where a section 1(18) abandonment is involved, we would not allow a discontinuance without investigation in such a situation. As in this and numerous previous cases, the abandonment would be decided on a consolidated record with the discontinuance.

Finally, petitioners argue that Congress, in the Railroad Revitalization and Regulatory Reform Act (4R Act), amended section 1(18) (now section 1a) to make it clear that discontinuance of all service comes under the abandonment provisions. (Section 1a(1) of the act was not in effect when the discontinuance notice and abandonment application were filed.) The new provisions would not alter our decision, however. While section 1a(1) now specifically states that a discontinuance of all service over all or any portion of a line is an abandonment, it does not affect the relationship between section 13a(1) and abandonments. This is recognized in the new abandonment regulations, to be codified at 49 CFR 1121.32(g), which require as part of the application:

> If passenger service is provided on the line, a statement of whether appropriate steps have been taken for discontinuance pursuant to sections 13a(1) and (2) of the Act, as amended, or the Rail Passenger Service Act, as amended.

There is an additional reason for rejecting petitioners' arguments. Were we to consider the service on a fragmented basis, the discontinuance notice would only cover service from South Bend to

Kensington. A separate abandonment notice would cover the 14 mile segment. Such dual notices, neither of which advises of the full extent of the service being terminated, would cause unnecessary confusion among the traveling public.

We affirm the decision that the Commission has concurrent jurisdiction under sections 1(18) and 13a(1) over South Shore's discontinuance of all passenger service between Randolph Street and Kensington.

EFFECTIVE DATE

Petitioners' second issue is:

> Whether the Commission at the end of the 4 month investigation period must discontinue the investigation immediately if it also orders continued train operation.

Petitioners argue that it was error to make the order which discontinued the proceeding effective on the date of service. They maintain that, in the past, orders requiring continued passenger train operation were effective immediately, but orders discontinuing the investigation were not effective until 20 to 35 days after the service date. Petitioners argue that such a delay in the effective date allows for orderly review. They complain that the Commission deviated from a long-established practice without explanation in this case.

The 4R Act changed the Commission's procedures for the handling of railroad proceedings. Section 303 added section 17(9)(d) to the act, which provides that the Commission has the power to make an order effective immediately. Since we are governed by new procedures, there can be no relevant long-established practice regarding effective dates. We will not always exercise our discretion to make an order effective immediately. Rather, we will tailor the effective dates to the factual situation.

Since continued service by South Shore was ordered, we do not understand how the immediate effectiveness of the discontinuance of the investigation could cause harm. Petitioners have requested and received two levels of administrative review. Under the circumstances, the immediate effective date has not interfered with the administrative review process.

We find that the immediate effective date of the discontinuance of the investigation was a reasonable exercise of our discretion under section 17(9)(d) of the act.

CONSIDERATION OF SOUTH SHORE'S REPLY

South Shore notes that in the prior order, no consideration was given to a reply filed by it on May 17, 1977. It has submitted a copy of its earlier reply, which bears the filing stamp of the Commission. South Shore requests that we now consider its reply, vacate the prior order, and restore the previous conditional grant of the abandonment application.

We will construe South Shore's request as a petition for administrative review under section 17(9)(d) of the act. The inadvertant failure to consider South Shore's timely filed reply constitutes materially changed circumstances (a possible violation of procedural due process). Therefore, we will review the prior order.

South Shore argues that all the findings necessary to sustain the conditional grant of abandonment authority were contained in the detailed report and order, and that no magic words are necessary. It points out that the trackage rights cover passenger service only, so that the only issue in the abandonment should be whether passenger service can be discontinued. It urges that there is no reason to retry the abandonment in the future.

We cannot ignore our statutory duties or the rights of petitioners. To grant an abandonment under section 1(a) [or in this case, section 1(18)], we must make a presently reviewable finding that the present or future public convenience and necessity permit the abandonment. That finding could not have been made in this case since it was specifically found:

> that the operation by the Chicago South Shore and South Bend Railroad of passenger trains over its line is required by the public convenience and necessity and that continued operation for a period of 10 months from the date thereof will not constitute an undue burden on interstate or foreign commerce.

While it is true that we can condition abandonment authority as required by the public convenience and necessity, we cannot abrogate our responsibility to make a present finding through conditioning an abandonment upon a future finding of public convenience and necessity, either express (when discontinuance allowed after investigation) or implied (when no investigation is instituted).

The request to vacate the prior order is denied.

SYSTEM DIAGRAM MAP

We remind South Shore that any abandonment application filed in the future will be subject to the requirements of section 1a of the act, as amended, and the Commission's new abandonment regulations, to be codified at 49 CFR 1121. Section 1a(5)(b) of the act, as amended, provides that we cannot grant a certificate of abandonment where there is opposition from a State unless the line has been designated on the carrier's system diagram map in category 1 for at least 4 months prior to the filing of the abandonment application. This requirement applies to all abandonments, including the abandonment of trackage rights.

This decision is not a major Federal action affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered:

(1) This proceeding is designated as one involving an issue of general transportation importance.

(2) The petition for administrative review, filed October 17, 1977, by the Illinois Commerce Commission, the State of Illinois, the city of Chicago, John W. McGinness, George B. Lee, and Robert D. Fritz, is denied on its merits.

(3) The request of Chicago South Shore and South Bend Railroad for administrative review, filed November 7, 1977, is granted.

(4) The request to vacate the order of the Commission, Division 3, Acting as an Appellate Division, served September 26, 1977, is denied.

(5) This order shall be effective on the date of service.

No. AB-1 (Sub-No. 14)[1]

APPLICATION OF THE CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY FOR ABANDONMENT OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY OPERATIONS BETWEEN McCLELLAND AND COUNCIL BLUFFS, IOWA

Motion to dismiss the proceeding in No. AB-1 (Sub-No. 14), denied; petition to reopen the proceeding in Finance Docket No. 17060 and petition to consolidate proceedings in No. AB-1 (Sub-No. 14) and Finance Docket No. 17060, granted.

Bruce C. Spitzer, for William M. Gibbons, trustee of the property of Chicago, Rock Island and Pacific Railroad Company, debtor.

Stuart F. Gassner, for Chicago and North Western Transportation Company.

Report and Order of the Commission

Division 2, Commissioners Stafford, Murphy, and Clapp

By Division 2:

History

The Chicago, Rock Island and Pacific Railroad Company (Rock Island) operates over a line of railroad between McClelland and Council Bluffs, Iowa, under a trackage rights agreement with the owner of the line, Chicago Great Western Railway Company (predecessor of the Chicago and North Western Transportation Company (C&NW)), dated September 10, 1951. The trackage rights agreement was approved by the Commission in Finance Docket No. 17060.

In Finance Docket No. 26081, *Chicago and North Western Railway Company Abandonment Between Harlan and Council Bluffs, Iowa,* C&NW applied for authority to abandon certain track and operations, including operations over the line between McClelland and Council Bluffs. By certificate and order served March 15, 1971, in that proceeding, C&NW was granted abandonment authority, which has since been exercised.

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[1] This report embraces Finance Docket No. 17060, Chicago, Rock Island and Pacific Railroad Company (William M. Gibbons, Trustee) operations over the properties of The Chicago and North Western Transportation Company (Formerly Chicago Great Western Railway Company) between McClelland and Council Bluffs, Iowa.

On June 25, 1973, C&NW filed an application under section 1(18) of the Interstate Commerce Act (act), seeking authority for William M. Gibbons, trustee of the property of Chicago, Rock Island and Pacific Railroad Company, debtor (Rock Island) to abandon operations between McClelland and Council Bluffs, Iowa, a distance of approximately 11.7 miles. In the alternative, C&NW requests that the Commission set terms and conditions for the sale and disposition of the involved line to Rock Island or set retroactive terms and conditions for the continued use of the line by Rock Island.

The abandonment application fell into a moratorium period as the result of *Harlem Valley Transportation Association* v. *Stafford,* 500 F. 2d 328 (2d Cir. 1974), which enjoined abandonments until appropriate environmental studies were made. During that period C&NW and Rock Island compiled and submitted environmental data.

On October 17, 1977, Rock Island filed a motion to dismiss the abandomnent proceeding for lack of jurisdiction. The motion was supported by a memorandum of law. On October 28, 1977, C&NW filed a reply to the motion to dismiss.

On October 28, 1977, C&NW also filed a petition to reopen the proceeding in Finance Docket No. 17060 and a petition to consolidate the proceedings in No. AB-1 (Sub-No. 14) and Finance Docket No. 17060. On November 16, 1977, Rock Island filed a reply in opposition to the petition to reopen.

In its motion to dismiss, Rock Island states:

> Unless and until the trackage rights agreement is terminated, this proceeding-whether considered an application to abandon, an application to modify or reform the trackage agreement, or an attempt to require the Trustee to purchase a line under terms set by the Commission—must be dismissed for lack of jurisdiction.

Rock Island cites *Burlington Northern, Inc.—Trackage Rights,* 347 I.C.C. 210 (1974) and *Delaware & H. R. Corp. Trackage Rights Agreement Modification,* 290 I.C.C. 103 (1953) for the proposition that the Commission has the power to reform trackage rights agreements only in the event that the agreement has expired by its own terms or by operation of an escape clause. Rock Island argues that the involved trackage rights agreement has not expired, and that, therefore, the Commission has no jurisdiction and should dismiss the abandonment application.

In its reply, C&NW argues that it is a party in interest with a right to file the abandonment application. C&NW argues that the

Delaware & Hudson case does not support dismissal since that case dealt with a trackage rights agreement entered into prior to 1940 when the Commission's jurisdiction over such agreements attached. C&NW states, "In essence, the matter involves section 5(10) of the Interstate Commerce Act regarding the Commission's continuing jurisdiction under Finance Docket No. 17060, in view of changed circumstances and conditions."

C&NW also points out that section 21 of the 1951 agreement allows C&NW, once it has abandoned its operations over the line and Rock Island has failed to exercise its option to purchase, to remove all of its facilities from the joint right-of-way and convey its interests to a third party, which immediately terminates the agreement. C&NW claims it could terminate the agreement by quitclaiming its interest in the property to one of its wholly owned transportation subsidiaries, but does not believe such a technical action is necessary since section 5(10) gives the Commission continuing jurisdiction over agreements previously approved under section 5(2).

In its petition to reopen the proceeding in Finance Docket No. 17060, C&NW points to events occurring since approval of the trackage rights agreement as justification for reopening. C&NW states that it has abandoned operations, as authorized in Finance Docket No. 26081, that it has filed its application in No. AB-1 (Sub-No. 14), and that Rock Island has refused to exercise its option under the trackage rights agreement to purchase the line. As a result, C&NW owns a line over which it does not operate and which is disconnected from the rest of C&NW's lines. C&NW also says that while the line was valued at only $870,000 in 1951, it is worth $2,200,000 now, and Rock Island pays rent based on the 1951 valuation. C&NW argues that in light of these changed circumstances, the terms of the agreement are not in the public interest.

In its petition to consolidate, C&NW alleges that the proceedings in Finance Docket No. 17060 and No. AB-1 (Sub-No. 14) involve essentially the same issues, subject matter, and parties. C&NW requests that the two proceedings be consolidated for decision.

In its reply to the petition to reopen, Rock Island examines the changed circumstances which C&NW claims justifies reopening and requests that reopening be denied because good cause has not been shown. Rock Island argues that C&NW's cessation of operations over the line and the line's disconnection from the remainder of C&NW's lines are issues that were considered and disposed of in Finance Docket No. 26081, when C&NW abandoned operations over the line in 1971. Justification for the 1971 abandonment was found in continued service by Rock Island over part of the line and in certain increased rentals to C&NW under the terms of the 1951 agreement.

Rock Island attacks as a bootstrap argument C&NW's citation of its filing of the instant abandonment application as justification for the reopening. Finally, Rock Island argues that its refusal to exercise its option to purchase the line was entirely within its rights and should have no bearing on the reopening question.

DISCUSSION AND CONCLUSIONS

There are a number of significant cases dealing with the reformation of trackage rights agreements. In *Thompson, Trustee, et al.* v. *Texas Mexican Railway Co.*, 328 U.S. 134 (1946)—perhaps the most famous case on point—the Texas Mexican Railway Company (Tex-Mex) owned a line of railroad between Robstown and Corpus Christi, Tex. In 1904, Tex-Mex enter into a trackage rights agreement with the St. Louis, Brownsville and Mexico Railway Company (Brownsville) which allowed Brownsville, for payment of specified rentals, to operate over the line. The term of the agreement was 50 years, unless sooner terminated by the parties. In 1940, Tex-Mex properly terminated the agreement, but Brownsville continued to operate over the line and refused to pay more than the rentals specified in the then-terminated agreement. Tex-Mex filed suit in the Texas courts and was awarded substantial damages based on the reasonable value of the use of the property by Brownsville.

The Supreme Court reversed the decision of the Texas courts. The Court noted:

> It is the function of the Commission to determine the terms and conditions under which trackage rights are acquired***. But a major concern of Congress in dealing with this problem was that neither inadequate rentals nor extortionate nor unreasonable extractions would be made for trackage rights.

Accordingly, the Court found that the lower courts should have awaited a Commission determination of the issues before taking action.

The Court found that section 5(2) only applies to trackage rights agreements entered into after the effective date of the Transportation Act of 1940. Thus, section 5(2) did not apply to the 1904 agreement between Tex-Mex and Brownsville. However, before Brownsville could cease operations over the involved track, abandonment authority under section 1(18) was required. Until abandonment was authorized, the trackage rights continued even though the agreement had been terminated. The Court said:

> The question of what would be the amount of fair rental to be paid by Brownsville would be highly relevant to a decision by the Commission on the issue of abandonment. We conclude that at least in this situation the Commission has the power under section 5(2) to fix a reasonable rental for the use of the facility by Brownsville regardless of the consent ot Tex-Mex.

The *Tex-Mex* case held that where a trackage rights agreement is terminated and an application to abandon the operation is denied, the Commission can fix the terms and conditions of continued operation pursuant to section 5(2) of the act. The Court further held that when the matter is presented, the Commission may, either authorize abandonment of operations with a condition that abandonment will be permitted unless the user "company" pays such reasonable compensation for the use of the property as the Commission may fix, or simply authorize the abandonment "without more."

In the companion cases, *City of New Orleans* v. *Texas & N. O. R. Co.*, 195 F. 2d 882 (5th Cir. 1952), and *City of New Orleans* v. *Texas & Pac. Ry. Co.*, 195 F. 2d 887 (5th Cir. 1952), the city of New Orleans operated a system of tracks which belted the city and gave access to many wharves along the river. The city operated a railroad service through the Public Belt Railroad Commission (Public Belt). In 1932, Public Belt and the Texas and New Orleans Railroad Co. (T&N.O.) entered into contracts for the handling of traffic, which were renewable for 999 years. In 1940, the contracts were amended and provided for the handling of "hold cars" (cars with no definite destination). The contracts provided that "hold cars" were to be held by Public Belt at no additional charge until delivery orders were given. The amendments received the approval of the Commission in 1941.

As the number of "hold cars" increased, Public Belt believed it was not being properly compensated. In 1945, Public Belt refused to accept "hold cars" unless T&N.O. agreed to additional compensation. T&N.O. got an injunction which enjoined Public Belt from refusing to accept "hold cars" on the terms of the amended contracts.

The United States Court of Appeals for the Fifth Circuit held that the injunction was improper since the question of compensation was for the Commission to decide. The Court stated at page 886:

> Now the Commission, in its report of August 28, 1941, held that the proposed modification of the contracts "is within the scope of section 5(2) of the Interstate Commerce Act as amended; that the terms and conditions of the proposed agreement are just and reasonable." The terms and conditions proposed for handling "hold cars" were thereby established by the Commission as just and reasonable. But they are not unchangeable, for by section 5(9) of the amended Act, it is provided: "The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate." If the terms and conditions of handling hold cars have now become unjust and unreasonable, a showing to that effect can be made to the Commission for a supplemental order.

The *Texas and Pacific* case, *supra*, dealt with the same "hold car" provisions and reached a similar result. The Court stated, at page 889:

> The infirmity lies in the subject matter—a charge for railroad service which cannot be permanently fixed by contract. The Public Belt is a railroad, though owned by the City. So long as it engages in interstate and foreign commerce it is subject to the federal law and the Interstate Commerce Commission, like any other railroad. The approval by that Commission does not make this charge for holding cars unchangeable for the whole life of the contract, which may be renewed for 999 years. The Interstate Commerce Act authorizing approval, in Section 5(9) (49 U.S.C.A. §5(9)) retains in the Commission power from time to time to make supplemental orders about it. This term of the contract, found to be reasonable and just in 1941, may under changed conditions have become otherwise.

Finally, we reach the case cited most often in the instant motions and petitions. *Delaware & H. R. Corp. Trackage Rights Agreement Modification*, 290 I.C.C. 103 (1953), essentially held that the Commission could not use any of its powers under sections 5(2) and 5(9) of the act to interfere with a valid contract, which was entered into prior to the enactment of the Transportation Act of 1940, before that contract was lawfully terminated. In *Delaware & Hudson*, the proceeding was dismissed for lack of jurisdiction until the question of lawful termination of the contract was settled by the courts. If the contract had been lawfully terminated, then the *Tex-Mex* case, *supra*, would apply.

Regarding trackage rights agreements which were entered into after 1940 and had been approved by the Commission under section 5(2) of the act, the Commission stated in language not relating to the outcome of the case:

> By section 5(9) we may, for good cause shown, make such order supplemental to any order made under section 5(2) as we deem necessary or appropriate. Therefore,

> upon a proper showing it might be found that we have authority to revise a trackage contract which we have approved under section 5(2) because the parties then are placed on notice of our continuing power in the premises.

We believe that the rationale of the companion *New Orleans* cases and the *Delaware & Hudson* case applies to the instant proceeding. The contract between Rock Island and C&NW's predecessor was entered in 1951, long after the enactment of the Transportation Act of 1940. The contract was approved by the Commission. In the report entered July 31, 1951, in Finance Docket No. 17060, the Commission stated:

> We find that the acquisition by the Chicago, Rock Island and Pacific Railroad Company of trackage rights over the main line of the Chicago Great Western Railway Company between McClelland and Council Bluffs*** is a transaction within the scope of section 5(2) of the Interstate Commerce Act, as amended, that the terms and conditions proposed are just and reasonable, and that the transaction will be consistent with the public interest.

We believe that it is possible to show that the terms of the trackage rights agreement are no longer just and reasonable and that the Commission, therefore, has the power to modify the agreement.

Having decided that the Commission may modify the trackage rights agreement we now turn to a disposition of the various motions and petitions.

Rock Island has filed a motion to dismiss the abandonment application. The owner of a line of railroad, which is being operated by another railroad pursuant to a trackage rights agreement, has standing to invoke section 1(18) of the act and apply for abandonment authorization. *Thompson, Trustee, et al.* v. *Texas Mexican Railway Co.,* 328 U.S. 134 (1946). Thus, C&NW has standing to apply for the abandonment of operations by Rock Island. Rock Island's citation of *Delaware & Hudson, supra,* in this regard is inappropriate. In *Delaware & Hudson,* the Commission refused section 1(18) jurisdiction because it had not been established that the agreement had terminated. The Commission stated at page 111, "We may not properly take jurisdiction of the application to abandon because it seeks to have us do indirectly what we may not do directly." Since we have decided that we have the power to modify the instant contract, *Delaware & Hudson* does not apply and the motion to dismiss should be denied.

C&NW has filed a petition to reopen the proceeding in Finance Docket No. 17060. In order to invoke the former section 5(9), now 5(10), good cause must be shown. However, C&NW need not prove its case in the petition in order to be heard. C&NW argues that the rentals it receives are based on a fixed percentage of the 1951 valuation, and that the value of the property involved has greatly increased since that time. C&NW argues that it has abandoned operations over the involved line, and that the line forms part of Rock Island's main line. C&NW argues that because of related abandonments the line is physically disconnected from the remainder of its lines. We believe that a sufficient showing has been made to justify reopening Finance Docket No. 17060 to take testimony on the reasonableness of the terms of the trackage rights agreement. The petition to reopen the proceeding in Finance Docket No. 17060 should be granted.

Finally, C&NW has filed a petition to consolidate. We believe that the matters involved in the now separate proceedings are virtually identical. Proper resolution of the two proceedings would be facilitated if they were decided on a consolidated record. Accordingly, the petition to consolidate No. AB-1 (Sub-No. 14) and Finance Docket No. 17060 should be granted.

While we have the power to modify the terms of the trackage rights agreement, we realize that if we were to do so we would be modifying the terms of a contract which was entered into following negotiation and agreement upon the terms in the contract. We hesitate to exercise this power unless it is necessary to the fulfillment of our statutory duty to ensure that the terms of such agreements are reasonable. Therefore, the report and order reopening the proceeding in Finance Docket No. 17060 to be renumbered as Finance Docket No. 17060 (Sub-1), will be made effective 90 days from the date of service to allow the parties time to negotiate for a possible resolution of their differences. C&NW and Rock Island are directed to negotiate in good faith. The parties are also directed to inform the Commission on a monthly basis of the progress of these negotiations. If no agreement has been reached within the 90-day period, the order reopening the proceeding will become effective, and we will take evidence regarding the reasonableness of the terms of the agreement in a manner to be determined at that time.

This decision does not significantly affect the quality of the human environment. Since no change in operations is expected to result from our action in this report and order, we contemplate no environmental Threshold Assessment Survey.

It is ordered:

1. The motion to dismiss the proceeding in No. AB-1 (Sub-No. 14) is denied.

2. The petition to reopen the proceeding in Finance Docket No. 17060, to be renumbered as Finance Docket No. 17060 (Sub-No. 1) is granted.

3. The petition to consolidate the proceedings in No. AB-1 (Sub-No. 14) and Finance Docket No. 17060 (Sub-No. 1) is granted.

4. This report and order shall be effective 90 days from the date it is served.

Decided March 6, 1978.

EX PARTE NO. 274 (SUB-NO. 2)

ABANDONMENT OF RAILROAD LINES AND DISCONTINUANCE OF SERVICE

Decided April 21, 1977

Regulations issued November 1, 1976, to implement section 1a of the Interstate Commerce Act, relating to the abandonment of rail lines and the discontinuance of rail service, reconsidered, and amended in part.

Appearances as previously shown, and

Edward K. Wheeler and *Robert G. Seaks* for the Chicago and North Western Transportation Company.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

By petitions filed, pursuant to rule 101 of the Commission's General Rules of Practice, the United States Department of Transportation (DOT), the Chicago and North Western Transportation Company (C&NW), the Railway Labor Executives' Association and the Brotherhood of Railway and Airline Clerks (RLEA and BRAC), and the Commonwealth of Pennsylvania (Pennsylvania) seek reconsideration of the final regulations adopted by the Commission, effective November 1, 1976, and served November 5, 1976, for the abandonment of railroad lines and discontinuance of service. Replies to petitions were filed by the Association of American Railroads (AAR), FS Service, Inc., and the International Minerals and Chemical Corporation (FS & International), the National Council of Farmer Cooperatives (NCFC), and the New York State Department of Transportation (NY DOT).

This proceeding was jointly instituted by the Commission and its Rail Service Planning Office by notice of proposed rulemaking and order (NPRO) dated July 30, 1976. Promulgation of new regulations for the abandonment of rail lines and the discontinuance of service was required by the Railroad Revitalization and Regulatory Reform Act (4R Act), Public Law 94-210,[1] enacted February 5, 1976.

The Commission's report, containing the comments made by the parties, the conclusions of fact and law made thereupon by the Commission, and an explanation of reasons for the adoption of the final regulations was served November 10, 1976.

PROCEDURAL MATTERS

Prior to the issuance of the final report in this proceeding, RLEA-BRAC filed a motion, dated October 26, 1976, to strike certain reply comments of AAR. All replies in the proceeding were due September 28, 1976. The motion to strike, was not disposed of in the initial proceeding. Upon the determination that the issues raised by RLEA-BRAC's motion could properly be presented to the Commission for disposition at a later date, RLEA-BRAC were informed that no further action on their motion would be taken "at the present time." Before setting out the parties' position on reconsideration, RLEA-BRAC's motion must be disposed of.

The main thrust of the complaint and motion to strike arises out of the Commission's request in its NPRO for comments on:

> (1) whether it is appropriate and desirable to develop new conditions for the protection of employee interest in the rulemaking proceeding, or if time requires in a separate but similar proceeding, and (2) suggested content and form of provisions for protection of the interest of employees, consistent with section 1a(4) of the Act.

The initial comments of AAR refrained from any suggestion on the development of employee protective conditions. However, in their jointly filed comments, RLEA-BRAC did state that they doubted that the development of such a formula could be appropriately undertaken in this rulemaking proceeding and suggested that Rail Management and Rail Labor be brought together, under the aegis of the Commission, to develop an appropriate formula of protection. In item 2 of its reply comments, under the heading "Additional Materials," AAR disagreed with RLEA-BRAC that any purpose could be served by the suggested discussion between representatives of management and labor. Since AAR made no mention of employee protective provisions in its initial comments, RLEA-BRAC now assert that AAR improperly utilized a document specifically reserved for reply statements as a vehicle to submit direct statements, thereby depriving them of the right to reply.

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[1] Amendments to the 4R Act, effected by section 218 of Public Law 94-555, the Rail Transportation Improvement Act, enacted October 19, 1976, were discussed in our report served November 10, 1976, and will not be reproduced here.

Issues raised on direct or initial comments may be responded to by parties to the proceeding. However, neither due process nor section 553(b)(3) of the Administrative Procedure Act requires a party to a proceeding to be afforded the opportunity to reply to a reply. The suggestion that appropriate protective conditions be developed through discussions between Rail Management and Rail Labor was made initially by RLEA-BRAC. AAR disagreed with the suggestion and so stated in its reply. The fact that RLEA-BRAC made its suggestion without including a discussion of its perception of the new requirements of the law,[2] and under the mistaken belief that AAR would not oppose its suggestion, does not restrict replies thereto to generalized statements without support of legal argument. In our opinion, AAR's reply was a proper response to the suggestion put forth by RLEA-BRAC. The motion to strike is accordingly denied.

Reply of New York.—The deadline for filing replies was December 30, 1976. New York's reply was filed January 3, 1977, and was 1 day late because of the intervening holiday and weekend. New York's reply will be considered to the extent that it responds to the petition filed by DOT. This limits consideration of New York's reply to computation of off-branch costs, designated part 1(1) of the reply. The other portions of New York's reply, designated part 1(2) and 1(3), are not properly raised in that they do not respond to the contentions of DOT, but introduce new evidence broadening issues not subject to reconsideration.

SUMMARY OF PETITIONS

Petition of C&NW.—C&NW did not separately file an initial comment to the proposed abandonment regulations served by the Commission on July 30, 1976. However, since C&NW was represented by the Association of American Railroads, which filed initial comments on behalf of its member railroads, the C&NW is a proper party to this proceeding and is thereby entitled to submit its petition filed December 8 1976, addressing the pertinent issues involved.

By its petition, C&NW requests elimination of the requirement for publication for those lines of railroad for which an abandonment application was pending at the time section 1121.22(c) of the regulations became effective. It points out that notices of pending abandonment proposals were posted and published in conformance with the requirements of the regulations in effect on October 31, 1976, and were served upon the Governor(s) of the State or States involved, the regulatory agencies of the State or States, rail users, and involved local communities.

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[2] In its notice of proposed rulemaking and order (p. 36) the Commission set forth its "preliminary view" that new section 1a(4) of the act required revision of the protective formula formerly used in abandonment cases.

C&NW argues that republication will be expensive and a hardship, and believes that republication and posting will cause a great deal of confusion with respect to abandonments pending final decision.

It also requests that the Commission issue a statement clarifying the requirements of section 1121.32(d)(1), concerning the use of the 12-month base year as a data base.

It is C&NW's interpretation of section 1121.32, that revenue and cost data shall be presented in accordance with the methodology of sections 1121.41-44 to the extent that such data are available for the base year. It believes this to be the correct interpretation of "base year" as defined by section 1121.11. The primary concern is that unless the Commission expresses a clarification of section 1121.32(d)(1), protestants to applications may interpret that section to preclude the filing of completed applications until the carrier has utilized the new accounting system for the subject branch line for a period of at least 12 months.

C&NW believes the Commission intended to implement the congressional intent that once a carrier has designated a line as a candidate for abandonment, it shall be permitted, after 4 months, to file an application for abandonment. It contends that it would, therefore, be appropriate for the Commission to issue such a statement of clarification to eliminate this potential for controversy.

Petition of DOT.—Dot seeks review of the regulations with respect to the filing of petitions to investigate and the formulation of specific requirements to be included in such petitions. Review is also requested of the provisions of the regulations pursuant to which the Commission may, based on changed circumstances, review its findings of public convenience and necessity when it is determined that a recalcitrant party has not engaged in meaningful negotiations with respect to a purchase or subsidy of a line. Dot also contends that its proposal for computation of off-branch costs is more appropriate than that adopted. In this respect, it contends that the Commission has not elucidated any reasons why the method adopted is preferable to the computation it proposed.

Petition of Pennsylvania.—By petition filed December 10, 1976, Pennsylvania requests redefinition of the requirements in section 1121.20(b)(1) and (2). It seeks to reduce the time period specified in section 1121.20(b)(1) from 3 years to 12 months. Additionally, it requests that the definition of a line in category 2 which is "potentially subject to abandonment" either read the same as section 1121.20(b)(2), but with an 18-month maximum time period instead of the previously mentioned 12-month period, or be deleted. Pennsylvania also believes that there are other reasons which make a line of railroad "potentially subject to abandonment," beyond those set forth in section 1121.20(b)(2) which must be included in the definition of that phrase as required by section 1a(5)(a) of the act.

Pennsylvania states that section 1121.36(a)(1) should be modified to require less information and no verification of a petition to investigate. It contends that the verification requirements impose an undue burden upon those parties desiring to protest an application and thereby seek to nullify the desire of Congress to *require* an investigation of proposed abandonments.

Pennsylvania furhter contends that the Commission is not permitted to determine the nature and extent of its investigation upon the filing of a petition to investigate according to the language of section 1a(3) of the act and requests section 1121.37(a)(1) be revised to require a full investigation upon receipt of such a petition.

Finally, Pennsylvania requests the Commission to clarify the proposition that subpart D branch line accounting standards do not apply to abandonment proceedings.

RLEA-BRAC's petition.—By their jointly filed petition, RLEA-BRAC contend that the Commission's report erroneously describes a case-by-case approach for the development of protective conditions. RLEA-BRAC request that the error be corrected and the Commission reconsider their suggestion that Rail Management and Rail Labor be brought together, under the aegis of the Commission, to adopt a negotiated protective formula. They further reiterate their suggestion that until an appropriate negotiated formula is developed, certificates issued pursuant to section 1a should include the following language:

> The interest of all railroad employees affected by approval of this abandonment (discontinuance) shall be protected by provisions at least as beneficial to such interests as provisions which have been established pursuant to section 5(2)(f) of the Interstate Commerce Act and pursuant to section 405 of the Rail Passenger Service Act.

RLEA-BRAC view section 1121.36(c)(1) of the adopted regulations, and the accompanying report, as erroneously restricting their right to require an investigation (1) limiting the time for filing petitions to investigate to 35 days and (2) by insinuating that rail labor organizations may not file in any case.[3] They allege that section 1a(3) of the amended act only requires the Commission to act on the issue of whether or not to investigate by the 55th day after the filing of the abandonment application and that the 35-day imposition is, therefore, legally questionable.

Finally, RLEA-BRAC restate their belief that the Commission improperly failed to rule upon their motion to strike before the report, which contained conclusions which could have been based on objectionable material, was issued.

SUMMARY OF REPLIES

NCFC.—NCFC limits its reply to the issues raised on petition by DOT. NCFC argues that an investigation is required when a petition to investigate is filed pursuant to section 1a(3) of the act and that, while the strict time limitations protect the carriers interests, the right to an investigation protects the public interest. Furthermore, NCFC believes the additional requirements for a petition to investigate proposed by DOT should not be incorporated in the final regulations since petitions considered frivolous by DOT may prove to be important to a small business or even an entire community.

NCFC supports the Commission's determination that it has the authority to reopen a proceeding where financial assistance negotiations have failed and deems the notice given by the Commission that it will reopen such proceedings a responsible act for the benefit of shippers.

NCFC believes DOT misconstrues section 307 of the 4R Act which requires the Commission to prescribe "a uniform cost and revenue accounting and reporting system for all common carriers by railroad" and supports the Commission's use of Rail Form A in its off-branch accounting system.

FS & International.—FS & International state that DOT was incorrect when arguing that the Commission had not justified adoption of section 1121.42(m) governing computation of off-branch costs. They contend that section 1121.42(m) is virtually identical to the regulation adopted in Ex Parte No. 293 (Sub-No. 2),

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[3] At page 32 of our report we stated: "Because of the requirements of section 1a(4) of the Act, there is obviously no need to institute an investigation in such a case (as where rail labor organizations request the imposition of protective conditions)."

Standards for Determining Rail Service Continuation Subsidies, which governs the computation of such costs for subsidy purposes.

AAR.—AAR agrees with the position of DOT that substantial information should be contained in a petition to investigate, that the Commission is able to reject and not investigate incomplete or frivolous petitions, and that the Commission does not have the power to reopen an abandonment proceeding when negotiations between the applicant railroad and potential subsidizer have failed. In addition, AAR believes that the Commission does not have the power to require the railroad to continue operation of a line for an additional year without contravening the congressional provision that the Commission could postpone issuance of a certificate of abandonment for a period not to exceed 6 months.

AAR believes the proposals of DOT for computing off-branch costs to be less precise than Rail Form A, and, therefore, an inappropriate method of computing off-branch costs.

New York DOT.—New York agrees with DOT that the computation of off-branch costs should be reconsidered, but proposes a distinct manner of computing such costs based on New York's initial comments.

Specifically, New York believes that the costs of Account 269-Roadway Maintenance and Account 271-Small Tools and Supplies should be apportioned to each branch line on a ratio of maintenance costs performed on the branch to the total system maintenance costs. New York contends that the adopted standard fails to recognize the fact that roadway machines are used to a much greater degree on main line and heavy traffic branches than on light-density lines where maintenance is labor intensive and would thereby result in excessive charges unrelated to the actual use of roadway machines on branch lines.

DISCUSSION AND CONCLUSIONS

Section 1121.20 System diagram.—Pennsylvania has requested the Commission to reconsider the definition of lines of railroad in category 1, section 1121.20(b)(1), and reduce the time of anticipated filing of an application form 3 years to 12 months in order to prevent a rail carrier from destroying a railroad line.

At page 13 of our report we stated the purpose of category 1 to be two-fold: (1) to give notice to the users of the service provided over light-density branch lines, and the communities served by such lines, of an attempt by the carrier to abandon service; and (2) to give the Commission, other Federal agencies, the States, local communities, rail service users, and the carriers themselves an opportunity to plan intelligently and effectively to develop and maintain an integrated transportation system.

The 3-year time period appears lengthy in the perspective of one railroad line. However, there are two factors which, justify the 3-year time period. The first factor is the number of railroad lines designated in category 1. In order for the many involved parties to plan intelligently and effectively to develop and maintain an integrated transportation system, communication and consultation must take place between them. This is a lengthy process requiring a broad time frame. Secondly, all lines of railroad in category 1, will not be on the system diagram map for 3 years. Some lines of railroad may appear on the map in category 1 for only 4 months, as required by section 1a(5)(b) of the act. Because of the multitude and timing of abandonment applications filed, a 12-month time frame for a line to be in category 1 is entirely too short to be of value to any interested party. Therefore, the definition of a line of railroad in category 1 will not be changed.

Section 1121.20.—Pennsylvania petitioned the Commission either to redefine category 2, section 1121.20(b)(2), or to delete it from the system diagram map.

Category 2 complies with section 1a(5)(a) of the act which requires each system diagram map to include a detailed description of each line of railroad which is "potentially subject to abandonment as such term is defined by the Commission." It is our opinion that said definition should encompass lines of railroad which the carrier is studying for possible future abandonment.

Having already determined that the time frame of category 1 should not be redefined from 3 years to 12 months, we refrain from redefining category 2 as a carbon copy of category 1, with the only change being an 18-month time frame. Category 2 is designed to give the railroads an opportunity to study these lines while concurrently alerting the public to the possible loss of train service. This category does not include lines where an abandonment is being sought, but merely lines of railroad the carrier has under study for possible future abandonment; that is, those lines which are "potentially subject to abandonment." Two separate categories of lines, then, are mandated by statute and are necessary to fulfill the full intent of the act.

We will, however, rewrite category 2 to clarify that it defines lines "potentially subject to abandonment." Section 1121.20(b)(2) will read:

> All lines or portions of lines potentially subject to abandonment *are those* which the carrier has under study and believes may be the subject of a future abandonment application because of either anticipated operating losses or excessive rehabilitation costs, as compared to potential revenues. [Emphasis added for clarity.]

No other modifications need be made to category 2.

Section 1121.22 Filing and publication.—C&NW believes that the posting and publication requirements of section 1121.22(c) should be modified so as not to require posting and/or publication of those lines for which abandonment applications are presently pending before the Commission.

We view the republication of all abandonment proceedings that are in their initial stages as essential if planners are to be able to project an accurate picture of a future transportation system within their communities. We are of course cognizant of the fact that there will be some expense involved in republication. However, at the time the previous publication for most presently pending proceedings was effectuated, communities did not have available the prospect of subsidy funds for continued operation of the rehabilitation of light-density lines. The publication of each of the categories is an important part of the overall congressional plan to have the involved State or community develop an integrated transportation system. Viewed from this perspective, the additional expense the carrier will incur in complying with this regulation is not sufficient to overcome our belief that we should not amend the regulations, as requested, to accommodate a one-time event.

However, we recognize the validity of C&NW's argument as it pertains to republication for applications which are already set for oral hearing, modified procedure, or those for which an order has been issued finding the public convenience and necessity does not require further continued operation of the line. For those applications, we believe the proceedings are in such an advanced state that adequate notice has been accomplished and the expense involved in republication would not be justified or warranted. The regulations will be amended to reflect this conclusion.

Section 1121.32 Contents of application.—This section of the adopted regulations requires that the revenue and cost data included in an abandonment or discontinuance application be computed for the "base year" from data collected at the branch line level. "Base year" is defined in section 1121.11 as:

> The latest 12-month period, ending no later than six months prior to the filing of the abandonment or discontinuance application; for which data has been collected at the branch level as prescribed in section 1121.40(b).

As first indicated in the notice of proposed rulemaking, carriers are required to maintain branch level revenue and cost data from the date a line is listed as potentially subject to abandonment.[4] A major purpose of this requirement is to insure that the applicant carrier will submit with its application the required supporting data and to defer the listing of lines which a carrier does not genuinely consider to be a future project for abandonment.

We agree with C&NW that Congress intended contested applications to be processed if the line proposed to be abandoned was listed in category 1 on the carrier's system diagram map 4 months prior to the date of filing of the application. As further pointed out by C&NW, some party to an abandonment application may misinterpret conformity with the 12-month-base-year requirement as a prerequisite to the filing of a completed application. This interpretation would be inconsistent with the statutory intent in that it would superimpose a 12-month moratorium on the processing of abandonment applications. Section 1121.32(d)(1) will, therefore, be clarified to indicate that the information provided for the base year must only be furnished to the extent that it is available.

Although a carrier must only begin its accumulation of branch line data when the line to be abandoned is designated on its map, we, nevertheless, would hope and expect that prudent rail management will begin its system of branch line data collection when it first reaches an internal decision to include a line in one of the pertinent categories. This forward-looking perspective would insure that the supporting data submitted is as accurate as possible and will minimize the necessity of supplementing the data at hearing.

Section 1121.36 Participation in proceeding.—Pennsylvania objects to the requirement that a petition to investigate be verified. On the other hand, DOT believes that there should be compliance with certain additional requirements, beyond those already adopted, in order to file such a petition. In this regard, AAR concurs with DOT. NCFC supports the concept of a petition to investigate as set forth in the Regulations.

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[4] As revised, the regulations require railroads to maintain branch level revenue and cost data for all lines listed in categories 1-4.

The Commission is faced with the delicate task of equitably balancing the interests of all concerned parties while complying with the congressional intent expressed in section 1a(3) of the act. We remain convinced that the proper balance is struck by requiring certain generalized information indicating the petitioner's interest in the proceeding, while also requiring that the petition be verified. By not requiring detailed submissions, we avoid discouraging the filing of legitimate petitions. On the other hand, the requirement for verification is the least restrictive precaution to the filing of frivolous petitions. By this, we do not suggest that Congress intended substantive qualifications for petitioners to be more than what was required for protestants in prior abandonment proceedings. However, unlike a protests to prior abandonment proceedings, a petition under the new regulations procedurally triggers an investigation. Since we do not believe Congress intended an investigation to be conducted on the basis of frivolous petitions, the verification requirement is necessary to establish the legitimacy of the petition and to promote the expeditious handling of abandonment proceedings.

This requirement should not pose an undue burden on petitioners. If a potential petitioner believes an objection to an application may be resolved without the Commission pursuing an investigation of the proposal he may simply file a comment. If a party wishes to file a petition, thereby triggering an investigation, the extent of which to be determined by the Commission, he should be prepared to participate to the extent required, and the verification of the petition is a very minimal requirement.

We further require a petition to investigate to be filed within 35 days of the date an application is filed. We also do not believe this requirement inflicts undue hardship in view of the notice given in advance that an abandonment application is going to be filed. The two general modes of notice give at least 4 months warning of the impending application via the system diagram map, and 30-days' notice from the posting and publishing requirements of section 1121.31 of the regulations. Thus, RLEA-BRAC, despite their objections to section 1121.36(c)(1), have sufficient time to prepare a petition to investigate.

RLEA-BRAC contend that the Commission, at page 32 of its report, seeks to deny rail labor the right to have an investigation instituted. This is not our intention. The language referred to at page 32 is intended simply to illustrate the type of objection to an application that may be satisfied by the imposition of appropriate conditions without the institution of an investigation of the entire abandonment proposal. Thus, railway labor organizations may file petitions to investigate. However, it is our judgment that such petitions are unnecessary when employee protective conditions are the only substantive arguments raised and will automatically be imposed pursuant to section la(4) of the act.

Section 1121.37.—DOT, NCFC, and AAR agree that the Commission may use its discretion in instituting an investigation. Pennsylvania, however, believes that the Commission cannot determine the extent and type of investigation, but must conduct a "full investigation."

Section la(3) of the act states "the Commission shall, upon petition *** cause an investigation to be conducted ***. " The word "shall" is imperative and does not imply the exercise of discretion. The statute, however, does not define investigation. There is no indication that Congress intended "hearing" and "investigation" to be synonymous. On the contrary, section 17 of the amended act states that "hearing" shall include written submissions of all evidence; but, section la(3) only states that an investigation is to assist the Commission in its determination. We also believe that a proper determination can be made without the "full investigation" in all instances, suggested by Pennsylvania. Therefore, the nature and extent of the investigation is left appropriately to the discretion of the Commission. Though one investigation may be of a broader scope or more formal than another, we shall conduct an investigation in compliance with the congressional mandate.

We find no reason to amend section 1121.37(a)(1) of the regulations.

Section 1121.38 Financial assistance procedures.—Prior to the issuance of the adopted regulations, numerous parties objected to section 1121.38(i)(2)(iii) providing for the reopening of the abandonment proceeding if subsidy negotiations failed after the allocated 6-month period. In our report we indicated that section 17(9)(g) of the act afforded the Commission authority to reopen any proceeding if there was evidence of "substantially changed circumstances." By its petition, DOT asserts that the changed circumstances must be central to the proceeding being reopened, and that subsidy negotiations are not central to the underlying abandonment.

The appropriateness of an offer of financial assistance under section 1121.38(f) does not influence a determination of whether a certificate of public convenience and necessity should be issued in the first instance. However, this is only because the act makes the finding of public convenience and necessity permitting the abandonment a prerequisite to the consideration of a subsidy offer. That is to say, under the act, the initial findings are made in the absence of an offer and not in contemplation or anticipation of whether an offer would indeed be made. However, to assert that the statutory precondition to the consideration of a subsidy offer somehow precludes the reopening of the abandonment proceeding is inconsistent with the congressional intent that every opportunity be afforded to facilitate assistance program for the purpose of preserving rail service.

Traditionally, whether or not a certificate permitting an abandonment will be issued is determined upon the weighing of the burden imposed upon the carrier and interstate commerce against the public need for continued service. These considerations are not altered under the 4R Act, and the burden of proof remains with the applicant.

It seems clear that if a bona fide offer of subsidy could result in a change in the substantive factors that were determinative of the initial findings (*e.g.*, removal of the financial burden from the applicant carrier), then the subsidy offer produces a substantially changed condition central to the underlying abandonment proceeding.

We reemphasize that this power to reopen will be used sparingly, but remain firm in our belief that it is essential fully to effectuate the congressional intent.

AAR, in addition to agreeing with DOT's position that the Commission does not have the power to reopen an abandonment proceeding when negotiations fail, further contends that the Commission lacks the authority to require a railroad to continue operations for 1 year under such circumstances.

We recognize that a potential subsidizer may conceive it to be in his best interest to forestall successful negotiations in the hope of having the abandonment proceeding reopened or the carrier required to provide service for an additional year in return for compensation computed by the Commission.

On the other hand, when Congress provided in section 1a(6)(a) of the act that the Commission shall postpone the issuance of a certificate of abandonment for a period "not to exceed six months," we do not believe the intent was to provide a means whereby a recalcitrant carrier could unfairly preclude the reaching of a reasonable agreement. The specific language of this section anticipates that an agreement will be reached within the 6-month period and cannot reasonably be interpreted to imply what should be done in the event negotiations fail. If, for example, the offeror agrees to pay the amount of subsidy, as computed in accordance with the standards in subpart D of the regulations, and the railroad nonetheless refuses the offer, we cannot conclude, under these circumstances, that either the law or public policy requires the Commission to issue a certificate permitting the abandonment.

Where the act does not specifically provide for the situation, the Commission has the obligation in promulgating its rules, to effectuate the full congressional intent in an adequate fashion. Accordingly, the four alternatives the adopted regulations outline in event of an impasse were designed to preclude both the potential subsidizer and the railroad from utilizing the language of the act as a club at the negotiation table. Since we are not persuaded that the four alternatives should be either deleted or modified, they will remain as adopted.

LABOR PROTECTIVE CONDITIONS

In our notice of proposed rulemaking and order we suggested that it might be appropriate protective conditions in this rulemaking proceeding rather than on a case-by-case basis. RLEA-BRAC did not favor this approach but suggested that the Commission direct rail labor and management to meet and attempt to develop an appropriate negotiated formula. Although we did not set RLEA-BRAC's suggestion out in detail in our report, it was not our intent to imply that they favored a case-by-case approach. In any event, our conclusion to proceed on a case-by-case method was not based on such an implication but upon the determination that the labor issues involved were substantive in nature and could be more properly resolved in the adversary setting of individual abandonment proceedings arising in the future. This rulemaking proceeding is primarily procedural in nature and not designed to develop a complete record sufficient to resolve substantive labor issues.

Section 1121.40 Standards for determining revenues, cost, et cetera.—Pennsylvania urges the Commission to clarify that the adopted rules of subpart D do not apply to the abandonment proceedings.

In our notice of proposed rulemaking, we clearly indicated that the revenue, cost, traffic, and other data submitted with the application will be utilized by the Commission in determining whether the public convenience and necessity permit the abandonment of a rail line, by responsible persons to formulate offers of financial assistance to assure continued rail service, and by the Commission to determine the adequacy of any such offers.

Although elements other than revenues and costs enter into determining whether a proposed abandonment is permitted by the public convenience and necessity, there is no practical reason for a different data base or methodology for use in connection with the Commission's finding of public convenience and necessity and its findings for financial assistance purposes. Logic and sound administration dictate that they should be identical. If it were otherwise, the Commission, the railroad, and the public would be faced with the situation in which a possible offeror of financial assistance would not have the information necessary to formultate such an offer upon the filing of an abandonment application.

DOT requests reconsideration of its alternative proposal for computing off-branch costs. New York agrees with DOT that the method for computing off-branch costs should be reconsidered, but propose a distinct manner of computing such costs based on their initial comments. New York has filed similar comments under the regional standards developed in Ex Parte No. 293 (Sub-No. 2) pursuant to the Regional Rail Reorganization Act of 1973 (3RA).

In our notice of proposed rulemaking and order we stated that because the same basic terminology is used in the 3RA and in the new abandonment and discontinuance provisions, we believe the Congressional intent is that the national standards should follow the conceptual approach of the regional standards. Consequently the regional standards are being used to provide the foundation upon which the national standards are based. Since New York's comments are the same in this proceeding as in Ex Parte No. 293 (Sub-No. 2), we believe their comments may best be considered in that proceeding and any changes to the regional standards arising out of that proceeding will be reflected by appropriate adjustments to the national standards at a later date.

DOT's proposed method would compute off-branch costs by multiplying the carrier's operating ratio times its systemwide variable cost percentage, times the attributable branch revenues. This approach would not take into account the length of the off-branch haul or the characteristics of the traffic on the line. Furthermore, we do not perceive the relevance of the individual carrier's operating ratio to the calculation of off-branch costs. For example, in 1975 the operating ratios of individual class I railroads (excluding Amtrak and Long Island) varied from a low of 33.1 percent for the Spokane International to a high of 125 percent for the Ann Arbor, but this does not signify that moving a particular carload of freight a given distance on the Ann Arbor would cost 3.8 times as much as a similar movement on the Spokane International. If the Ann Arbor's systemwide variable costs were assumed to be as much as 80 percent of total cost, the application of this proposed method would result in off-branch costs consuming all the revenues for every carload, regardless of the length of haul or the level of rates applying to the traffic involved. No matter how much rates were increased, it would be impossible for them to cover the off-branch cost so computed.

Since there is no consensus on an alternative methodology, and the method proposed by DOT is less precise than that established in subpart D, the adopted regulation governing the computation of off-branch costs will remain unchanged.

ADDITIONAL MATTERS

Section 1a(2)(a) of the amended act requires a carrier to submit to the Commission a notice of intent to abandon and have attached thereto an affidavit certifying that a copy of the notice was served on Governors, the Public Service Commission of the involved States, significant users of the line, and designated State agencies. The effect of this section is to require all publication and posting requirements for the notice to be completed before the Commission receives its notice of the carrier's intent to abandon. This presents an administratively undesirable situation since it is essential that the Commission also receive notice of the railroads' imminent plans to abandon at least concurrently with public notification. Our regulation, section 1121.30(a), will be revised to require that the carrier advise the Commission of its intent, by certified letter, concurrently with service of its first notice upon one of the required parties.

FINDINGS

Appended hereto are the revisions to the regulations, incorporating all the changes referred to in the report herein.

Based on the discussion hereinabove, the Commission finds that the revisions are reasonable and necessary and that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

APPENDIX OF REVISIONS

Section 1121.20(b)(2) is revised as follows:

(b)(2) All lines or portions of lines potentially subject to abandonment are those which the carrier has under study and believes may be the subject of a future abandonment application because of either anticipated operating losses or excessive rehabilitation costs, as compared to potential revenues.

Section 1121.22(c) is supplemented by the addition of the following:

Republication of category 3 lines, which prior to November 1, 1976 were already set for oral hearing, modified procedure, or for which an order has been issued finding public convenience and necessity not to require future continued operation of the line, is not required for compliance with this section.

Section 1121.32(d)(1) is clarified to read:

(1) Computation of the revenues attributable, avoidable costs, and reasonable return on value for the line to be abandoned for the base year (as defined by section 1121.11(c) and to the extent such branch level data is available), in accordance with the methodology prescribed in section 1121.41-44, as applicable, and submitted in the form called for in section 1121.45, as exhibit 1.

Section 1121.30(a) is supplemented to read:

(a)(1) The applicant shall give notice of its intent to file an abandonment or discontinuance application by (1) serving notice on the Commission by certified letter at least concurrently with service upon those shippers who are significant users (as defined in section 1121.11(m) of this part) of the line proposed to be abandoned or discontinued, or at the time the notice is first published, whichever first occurs, on the Governor (by certified mail), on the Public Service Commission (or equivalent agency), and on the designated State agency of each State in which all or part of the line of railroad sought to be abandoned or over which service is proposed to be discontinued is situated, or at the time the notice is first published, whichever occurs first (2) ***.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 21st day of April 1977.

EX PARTE NO. 274 (SUB-NO. 2)

ABANDONMENT OF RAILROAD LINES AND DISCONTINUANCE OF SERVICE

Upon further consideration of the record in this proceeding, the report and order of the Commission herein, effective November 1, 1976, wherein regulations for the abandonment of railroad lines and discontinuance of service were promulgated and adopted; the petitions of the United States Department of Transportation, the Chicago and North Western Transportation Company, the Railway Labor Executives' Association and the Brotherhood of Railway and Airline Clerks, and the Commonwealth of Pennsylvania, and the replies thereto filed by the National Council of Farmer Cooperatives, the Association of American Railroads, the New York

Department of Transportation, and jointly by FS Services, Inc. and the International Minerals and Chemical Corporation; and the Commission on the date hereof having issued its report on further consideration which report is made a part hereof:

It is ordered, That the revisions to the regulations as set forth in the appendix to the report be, and they are hereby, adopted;

It is further ordered, That this order shall become effective on the date it is served;

It is further ordered, That except as herein revised, modified, supplemented, or amended, the regulations and accompanying report and order effective November 1, 1976, in the above-enitled proceeding, shall remain in full force and effect; and

It is further ordered, That notice of this order shall be given to the general public by depositing a copy thereof in the Office of the Secretary of the Commission at Washington, D.C., and by filing a copy with the Director, Office of the Federal Register

FINANCE DOCKET NO. 28654[1]

ITEL CORPORATION—CONTROL—GREEN BAY AND WESTERN RAILROAD COMPANY

Petition for waiver and/or clarification of ICC Railroad Acquisition, Control, Merger, Consolidation Project, Trackage Rights and Lease Procedures, 42 F.R. 14871 (to be codified in 49 CFR 1111) granted.

Petition for leave to file a reply to the petition for waiver and/or clarification permitted only in certain circumstances.

An exception to the service requirements of a petition for waiver is granted.

The definition of applicant is revised as it applies to a securities stock purchase transaction.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Itel Corporation (Itel) filed a petition on January 10, 1978, and supplemented it on January 25, 1978, seeking waiver or clarification of certain of the requirements of the ICC Railroad Acquisition, Control, Merger, Consolidation, Coordination Project, Trackage Rights and Lease Procedures, 42 F.R. 14871 (to be codified in 49 CFR 1111) (Consolidation Procedures). Itel has made a tender offer to acquire the outstanding securities of the Green Bay and Western Railroad Company (GBW), a class II railroad. Itel owns three class II railroads, the Hartford and Slocomb Railroad Company (H&S), the McCloud River Railroad Company (McCloud), and the Ahnapee & Western Railroad Company (Ahnapee), and proposes to file an application to gain control of GBW pursuant to section 5(2) of the Interstate Commerce Act (act).

Brae Corporation (Brae) filed a petition for leave to file a reply to the Itel petition for waiver on February 21, 1978. Brae filed its reply to Itel's petition on the same date.

STANDING TO REPLY TO A PETITION FOR WAIVER

Brae contends that it should be permitted to file a reply to Itel's petition for waiver. Brae states that its standing arises from (1) being an adverse party to Itel in an investigation before the Commission involving control of the securities of the GBW, and (2) not being notified that Itel was seeking a waiver of the Consolidation Procedures.

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[1] A copy of this report and order will be filed in Ex Parte No. 282 (Sub-No. 1), Railroad Consolidation Procedures.

In handling one of the first petitions for waiver of the Consolidation Procedures it was said that, "We believe this petition, and any future petitions of this nature, are a benefit to both the carriers and ourselves in the expeditious handling of railroad consolidations. Therefore, we invite petitions for waiver and/or clarification of the Consolidation Procedures and any of our related regulations to be filed prior to the filing of the application under section 5(2) of the Act." ***Burlington Northern, Inc.—Control & Merger—St. L.***, 354 I.C.C. 182, 183 (1977). In discussing petitions for waiver in general it was stated:

> We cannot overemphasize the importance of petitions, such as the one we have dealt with here, being filed. In this difficult area of railroad consolidations, with such complex and far-reaching economic ramifications, we welcome any petitions such as this one which enables the involved carrier and ourselves to expedite these proceedings.
>
> Parties which believe that they may be adversely affected by the grant of the petition will have the opportunity at prehearing conference to request that the application be modified and/or supplemented. [*Id.*, at 190-191.]

We have not required notification of any other person when a petition for waiver was filed. This was so that we could handle the petitions in an expeditious manner without awaiting replies. We still believe that this is the preferred manner of handling petitions for waiver of our regulations. However, Brae has pointed up an instance where an exception to this general rule should exist. When a proceeding involving the same parties and a related transaction is pending before us, we will require notification of the filing of a petition for waiver by service of the petition on the other parties to the pending proceeding. We will apply this rule prospectively.

We have instituted an investigation in F.D. No. 28638, ***Brae Corporation* v. *Itel Corporation, et al.***, served January 20, 1978 (not printed). Brae and Itel have been involved in a bidding contest to acquire the securities of GBW. We will not require Itel to serve a copy of its petition for waiver on Brae, but we will grant Brae's petition for leave to file a reply, and entertain the evidence of arguments presented in the reply.

PETITION FOR WAIVER

Itel requests that the joining in the application by GBW be waived, since GBW has no control over the purchase of its outstanding securities. Brae believes that GBW should join the application because (1) it is required by footnote 1 of the Consolidation Procedures, (2) the Commission could impose conditions on GBW to protect the public interest in the event the control application were granted, (3) GBW classes A and B debentures could require participation by GBW in the sale of securities, and (4) Itel has not shown good cause for granting the waiver.

If unusual difficulties arise in, or undue burden would result from the furnishing of the information required in connection with any application or report, the Commission may, upon an appropriate showing, modify such requirement. See 49 CFR 1110.10 (1977). It is within our power to waive the requirement that GBW join the application set out in footnote 1 of the Consolidation Procedures.

Our power to impose conditions upon approval of a control transaction is grounded in section 5(2)(b) of the act. We may impose just and reasonable conditions in a transaction which is consistent with the public interest. In the event we would approve control of GBW by Itel, imposing conditions on GBW through Itel would pose no problem.

We do not find Brae's argument relating to the rights of GBW security holders of merit here. Even if the argument had merit, Brae, on page 2 of its reply, states that consent of 75 percent of the holders of capital stock outstanding is necessary. Itel, as of the date of its petition had made a tender offer to acquire over 95 percent of the capital stock outstanding.

The proper test to waive a regulation is an "appropriate showing," not "good cause." See 49 CFR 1110.10 (1977).

The securities of GBW are proposed to be acquired by Itel. No conscious effort or affirmative step is required of GBW for the transaction to be completed. We have a liberal policy of granting waiver from the technical requirements of the Consolidation Procedures. See *Burlington Northern, Inc.—Control & Merger—St. L., supra*, and *Chicago & North Western Transp. Co.—Trackage Rights*, 354 I.C.C. 193 (1977). We have stated that where the Norfolk and Western Railway Company and the Baltimore and Ohio Railroad Company are proposing to acquire control of the Detroit, Toledo and Ironton Railroad Company (DT&I) through the purchase of its stock, that DT&I has no control over who buys its stock. F.D. No. 28499, *Norfolk and Western Railway Company and Baltimore and Ohio Railroad Company—Control—Detroit, Toledo and Ironton Railroad Company*, served November 10, 1977 (not printed). For these reasons we will not require GBW to join in the application. However, except as specifically waived in this order, the application is required to supply all of the information from Itel and GBW necessary to comply with the Consolidation Procedures.

Itel proposed to file annual reports for 1975 and 1976 for itself and GBW with the application. Brae does not oppose this request. Itel will then supplement its application with annual reports for 1977. This is in lieu of filing the annual reports for the 2 years preceding the filing of the application required in section 1111.2(a)(2) of the Consolidation Procedures. We realize the problem involved in compiling yearend reports at the beginning of the subsequent year. Itel proposes a reasonable solution. Therefore, we shall consider the filing of annual reports for GBW and Itel for the years 1975 and 1976 to be in compliance with section 1111.2(a)(2) of the Consolidation Procedures, provided that the 1977 annual reports for GBW and Itel are filed on or before March 31, 1978.

Brae does not believe that we should permit waiver of section 1111.1(a)(3), (4), and (7). There is no request for waiver of this portion of the Consolidation Procedures. Based on the petition for waiver and the Consolidation Procedures, we believe Brae objects to waiver of section 1111.2(a)(3), (4), and (7). Brae argues that if GBW is an applicant these requirements should not be waived, and that inaction by GBW's board of directors resulted in the transaction. Whether the GBW board of directors invited Itel's control proposal is a matter requiring evidence, and not mere conjecture. As we have previously discussed, GBW as an entity is not affirmatively involved in the proposed transaction. The actions of GBW will have no impact on the ownership of its outstanding securities. Requiring director resolutions and stockholder approval of the transaction from GBW would be a futile gesture, since neither is required for the sale of stock by shareholders of GBW. We will waive this requirement in section 1111.2(a)(3) of the Consolidation Procedures with respect to GBW. There is no need for an executive officer of GBW to sign and verify the application since GBW, as an entity, is not involved in the transaction. We will also waive section 1111.2(a)(4) of the Consolidation Procedures with respect to GBW. In this same vein, Itel has requested us not to require an opinion of counsel from GBW. In these circumstances this request is reasonable and we will waive section 1111.2(a)(7) of the Consolidation Procedures with respect to GBW. In the similar situation in F.D. No. 28499, *supra*, we waived section 1111.2(a)(3) and (7) of the Consolidation Procedures upon request. There was no request to waive section 1111.2(a)(4) of the Consolidation Procedures in that case.

Itel is a multi-faceted conglomerate with a large percentage (in excess of 97 percent) of its employees engaged in nonrailroad activities. It requests that pension and attrition information not be required for those employees in nonrail activities. Brae does not oppose this request. The portion of the Consolidation Procedures relating to employees, section 1111.2(a)(10), was promulgated to ensure that the Commission would have sufficient information to protect the interests of the railroad employees affected. See section 5(2)(f) of the act. Therefore, we do not need to waive section 1111.2(a)(10)(ii, vi) of the Consolidation Procedures. Instead, we will clarify that the section applies only to the railroad employees of GBW, H&S, McCloud, Ahnapee, and Itel.

Itel requests waiver of section 1111.2(c)(1-3) of the Consolidation Procedures. These subsections relate to revenue carload data, revenue and commodity information, and traffic study information. Brae believes this information is essential to a decision consistent with the public interest. Neither H&S nor McCloud connect with GBW. The Ahnapee connects only with the GBW and has interchanged minimal traffic of 694, 500, and 444 cars in 1975, 1976, and 1977, respectively. Although there is an exchange of traffic, it is de minimus. Further, the difficulty and cost of developing this information far outweigh the value such de minimus traffic data would have in our reaching a decision. It is our opinion that granting the requested waiver of section 1111.2(c)(1-3) of the Consolidation Procedures will not adversely affect our disposition of the proposed application.

Itel requests permission not to file separate financial statements for its nonrail subsidiaries. Brae opposes this request so that it may discover the effect of this transaction on GBW and subsidiaries of Itel. Itel also requests permission to submit the consolidated financial statements of Itel and financial statements of GBW for yearend 1977 when available, instead of with the application. Itel will include in the application financial statements for itself and GBW for the 9-month period ended September 30, 1977. We have no objection to the filing of consolidated financial statements by Itel as long as separate financial statements are filed for carrier subsidiaries and those subsidiaries engaged in railroad-related business. This will permit Brae and ourselves to discover any proposed intracorporate financial relationship affecting GBW and other carriers. With regard to filing the financial statements for yearend 1977, we will permit their filing after the application has been filed. However, we will require the filing of these statements prior to March 31, 1978, and will so condition our acceptance of the application, if indeed the application is accepted. We will waive section 1111.2(c)(5) and (6) for those subsidiaries of Itel that are not carrier subsidiaries or engaged in railroad-related business.

Itel controls two motor carriers. McCloud River Trucking Company operates pursuant to certificate of registration No. MC-125604 (Sub-No. 2) and McCloud Railroad operates under certificate No. MC-28759. GBW has authority to operate as a motor carrier pursuant to certificate No. MC-58273 (Sub-Nos. 1, 2, 3, and 5). Itel requests permission to file a single control application for both rail and motor control, and publish a single notice. We agree with Itel that it would be economical and avoid duplication to file one application. That application must contain the information necessary to comply with the Consolidation Procedures and form OP-F-45 (see 49 CFR 1003.1 and 49 CFR 1134 (1976)). The preparation of a single notice is another matter. Since rail and motor notices are segregated when published in the Federal Register, proper notice can only be given to prospective parties if separate, but cross-referenced, rail and motor notices are published. We will not require the motor carrier portion of the application to be complete at the time of filing, but we will expect completion no later than March 31, 1978.

APPLICANT

This situation presents us with an opportunity to clarify the definition of an "applicant" in footnote 1 of the Consolidation Procedures. Prior to adoption of the Consolidation Procedures, the term "applicant" did not automatically include all carriers with properties involved in the proposed transaction. Corporate documentation, directors' approval and shareholder approval were required only of the applicants and those carriers which were a party to the transaction. The Consolidation Procedures have defined "applicant" to include the actual initiating party and all carrier with properties directly involved in the proposed transaction:

> As stated in the Notice of Proposed Rulemaking and Order served May 28, 1976, in Ex Parte No. 282 (Sub-No. 1), the revision of the railroad consolidation procedures was necessitated by the enactment of sections 5(2)(g) and 5(3) of the Interstate Commerce Act in the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Public Law 94-210. Section 5(2)(g) imposes strict time limits on the

> Commission's processing of all rail consolidation proceedings, and section 5(3) provides an expedited procedure for handling railroad consolidations and requires that the Commission act in an even shorter time than required under section 5(2). The Conference Committee reports to both the Senate and the House of Representatives clearly state that, except for its time limitations, the new statutory merger procedures were not intended to affect the standards or case law then utilized by the Commission under section 5(2) *S. Rep. No.* 595, 94th Cong., 2d Sess. 174 (1976); *H.R. Rep. No.* 781, 94th Cong., 2d Sess. 174 (1976). Our primary purpose in revising the railroad consolidation regulations was to identify the information normally relevant to the consideration of the three categories of railroad consolidation proceedings set forth therein, and to provide for submission of that information, in a uniform manner, as early in the proceeding as possible. [*Chicago & North Western Transp. Co.—Trackage Rights, supra,* at 194.]

When a stock purchase is being made of one railroad by another, and the company whose stock is sought to be acquired in a control proceeding has not participated in the exchange, we have found that certain requirements of the Consolidation Procedures do not apply. In this proceeding and F.D. No. 28499, *supra*, we have found that the railroad over which control is sought has no active role in the transaction. For that reason it is unnecessary and burdensome to require the information in section 1111.2(a)(3), (4), and (7) of the Consolidation Procedures for a company over which control is sought. We will modify footnote 1 by inserting an additional sentence after the final sentence, as follows:

> An applicant that has not actively participated in an attempt by another railroad to control it through a securites purchase transaction is not required to file the information requested in section 1111.2(a)(3), (4), and (7).

We find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

VICE CHAIRMAN CHRISTIAN was absent and did not participate.

It is ordered:

(1) The petition for leave to file a reply is granted.

(2) The petition for waiver is granted to the extent set forth in the report.

(3) The proceeding in Ex Parte No. 282 (Sub-No. 1) is reopened for further consideration, on the present record, of our report and order of January 28, 1978, only insofar as it adopted footnote 1 to

amended Part 1111 of Title 49 of the Code of Federal Regulations, the text of which is at 348 I.C.C. 801, as amended in *Chicago & North Western Transp. Co.—Trackage Rights*, 354 I.C.C. 193 (1977).

(4) Footnote 1 to Part 1111 of Title 49 of the Code of Federal Regulations is further amended by inserting additional sentence after the final sentence, as follows:

> An applicant that has not actively participated in an attempt by another railroad to control it through a securities purchase transaction is not required to file the information requested in section 1111.2(a)(3), (4) and (7).

(5) Notice of this order shall be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing a copy with the Director, Office of the Federal Register.

(6) This order shall be effective on the date of service.

Decided March 13, 1978.

DOCKET NO. AB-19 (SUB-NO. 19)

BALTIMORE AND OHIO RAILROAD COMPANY ABANDONMENT PORTION OF THE OHIO AND LITTLE KANAWHA BRANCH BETWEEN RELIEF AND PHILO, IN MUSKINGUM, MORGAN AND WASHINGTON COUNTIES, OHIO

Decided March 13, 1978

On exceptions, initial decision of the Administrative Law Judge, affirmed, with modifications.

Appearances as shown in initial decision.

REPORT OF DIVISION 1 ON EXCEPTIONS

BY THE DIVISION:

This proceeding is before us because of the filing of exceptions to an initial decision of an Administrative Law Judge. The initial decision was served on August 25, 1977, and recommended that the proposed abandonment be permitted. The complete facts of this proceeding are contained in the initial decision and will not be repeated here except as necessary to the discussion of a particular point or issue.

On September 29, 1977, the following protestants filed exceptions to the initial decision: Malta Division of Philips Industries, Inc. (Malta Division), the Public Utilities Commission of Ohio (Ohio PUC), and the Co-Operative Legislative Committee, Railroad Brotherhoods and Railroad Unions, State of Ohio (the Union). Further exceptions were filed by the Village of Malta, Ohio, on September 30, 1977, and by Taylor Woodcraft (Taylor) and the Malta-McConnelsville Chamber of Commerce (Chamber of Commerce) on October 20, 1977. The applicant, the Baltimore and Ohio Railroad Company (B&O or applicant) replied to all filings on November 3, 1977.

On December 7, 1977, counsel for Malta Division filed a letter-petition requesting oral argument. The first ground for this request was that limitations placed upon the length of prior briefs and exhibits had limited the consideration of the issues. The second supporting argument asserts that oral argument would give the Commission an opportunity to elicit further information and clarification with respect to particular issues that need further exploration.

DISCUSSION AND CONCLUSIONS

The request for oral argument made by Malta Division should be denied. The simple letter-petition does not persuade us that the issues of fact or law cannot be adequately considered and decided on the present record. The allegation that sufficient evidence can only be made available at oral hearing is believed by the extensive exceptions filed.

The parties raise the following issues: (1) that the Administrative Law Judge failed to make certain required and important environmental findings, and (2) that much of the cost and engineering-related evidence relied upon or accepted by the Administrative Law Judge was improperly computed or accepted.

We will speak first to allegations of error with respect to environmental matters. The Unions argue that the initial decision ignores "an important question of policy, namely, preservation of energy in the United States which question is involved and is without governing precedent." The Administrative Law Judge is accused of ignoring the importance of the need for rail service to transport coal from the area served by the line in question and also from specific shippers. We are asked to consider that abandonment will hinder development of the resources in the area and also force shippers to substitute motor transportation for the more fuel efficient rail service.

The Village of Malta joins in this argument by arguing that the wooden windows produced by Malta Division are such a superior insulating product that the loss of rail service would have a profound impact upon the Nation. Both parties state that they know of no precedent for the action they seek, but request that this environmental problem be considered.

Taylor filed its exceptions late, and stated only that it wished to join in the exceptions already filed by the other parties. Since there is no objection and the pleading will not prejudice any party or unduly broaden the issues, we will accept it.

The applicant replied that the arguments raised with respect to environment and/or energy did not warrant any comment by the

Administrative Law Judge and are irrelevant to this decision. It is argued that the record fails to show any relationship between coal deposits in the area and any present or future need of the line to transport such coal.

We believe that the Administrative Law Judge erred procedurally by not specifically addressing the merits of the energy issue. There is sufficient legal precedent from both the National Environmental Policy Act (NEPA) and our own abandonment regulations to require an initial decision to articulate environmental issues. For example, regulations set forth in 49 CFR 1108.18(a) require that:

> Where environmental matters are in issue in a proceeding, the initial decision will include all necessary findings and conclusions on such issues. It may also include findings and conclusions which affirm or modify the content of an EIS or TAS. To the extent such findings and conclusions differ from those in the EIS and TAS, the EIS or TAS will be deemed modified to that extent.

The Threshold Assessment Survey (TAS) prepared in this proceeding and the Addendum which responded to comments on the original TAS, were not objected to by any party. Those documents very clearly and thoroughly discussed the issues raised on exceptions. The only error on the part of the Administrative Law Judge in this respect was not to discuss or incorporate the findings in those documents into the initial decision. We will do that now.

With respect to coal resources and the necessity for rail service, the conclusion is inescapable that future coal mining in the area is highly speculative at best. At page 3 of the Addendum to the TAS, the following statement was made in response to a question from the Chamber of Commerce:

> While coal resources exist in the affected area, economically recoverable reserves are limited by the depth and the relative thinness of the coal seams as well as the poor quality of the fuel itself. Substantial coal reserves are reported for nearby counties but the coal development potential in the Muskingum Valley area under discussion is not considered major at this time. Future extraction of the area's coal resources is dependent upon a combination of economic factors, environmental conditions, need for energy, and technological improvements, not merely upon the existence of any one particular mode of transportation.

At page 5, in response to a comment from Malta Division, the Addendum notes that there are only two coal mines working near the line sought to be abandoned, and they are not dependent upon the existence of any rail line. The original TAS contains a long and exhaustive study of the effect the proposed abandonment will have upon present or future coal production in the area.

The conclusion is clear that coal production in the area is clearly speculative, and not a sufficient possibility to require continued operation of the unprofitable line in question. We have often said that a mere possible need for railroad service at some indefinite time in the future is insufficient grounds upon which to deny permission to abandon an unprofitable line. See *Long Island R. Co. Abandonment*, 228 I.C.C. 779.

The record is also not convincing that there is a valid environmental or energy objection with respect to the increased costs of receiving raw materials for the construction of wooden windows, and/or their ultimate shipment to consumers. A closer examination of the arguments show that the real objection is to the possible increased costs that Taylor will experience, rather than the impact upon the Nation of more expensive wooden windows.

While we are sympathetic, the facts simply do not show that energy considerations alleged are sufficient to warrant denial of the abandonment application.

Where, as here, other means of transportation are available, the mere fact that higher costs may result to a shipper because of the abandonment is not sufficient justification for requiring applicant to expend large sums to rehabilitate and maintain a line of railroad with no practical chance of recoupment of such costs. See *Missouri-Kansas-Texas R. Co. Abandonment, Okla.*, 338 I.C.C. 728 (1972). We have also stated that an application for abandonment need not be denied merely because users will experience higher shipping costs, *Illinois Term. R. Co. Abandonment*, 312 I.C.C. 607 (1961), or suffer some inconvenience, *Baltimore & O. R. Co. Abandonment*, 328 I.C.C. 108 (1965).

We will now turn to the arguments that the Administrative Law Judge erred in his findings of cost and engineering evidence. We have very carefully and thoroughly considered all of the arguments and have concluded that the initial decision adopted two minor conclusions which may have been technically inaccurate, but which do not require reversal or modification.

Of six cost-related issues raised by protestants, we find that three have merit and three do not. The arguments relating to (1) whether rerouting of traffic is an avoidable cost, (2) return on track and materials, and (3) off-branch costs for traffic either originating or terminating on the branch line, are without sufficient merit or proof to warrant reversal. The arguments for (1) disallowance of fringe benefits for the station agent, (2) disallowance of the fireman's wages and associated fringe benefits, and (3) noncompensativeness of the rate structure and divisions of revenues have merit, but vary in relevance and importance to the final decision.

Realistically, protestants' basic argument is that the applicant has failed to prove that the branch line is operating at a loss. We disagree. Applicant has isolated the abandonment section and determined the losses that would have been incurred on that line if service to rail patrons had been performed without consideration of overhead movements.

Each branch line of railroad must pay its own way and losses flowing from operation of unprofitable and unnecessary branch lines are inevitably a burden on interstate commerce, whether at the time the system as a whole is profitable or unprofitable. See *New York Central R. Co. Abandonment*, 254 I.C.C. 745 (1944). In abandonment proceedings involving overhead traffic, the Commission has long recognized that, while revenue derived from overhead traffic is a factor in determining a line's earning capacity, local shippers who are unable to support a railroad cannot demand continued rail transportation simply because the branch is used for movement of through traffic which could be handled as expeditiously over other routes. See *Chicago, M., St. P. & P. R. Co. Trustees Abandonment*, 240 I.C.C. 763, 767 (1940). This policy reflects the well-established principle that the routing of overhead traffic and the selection of alternate routes for the handling of such traffic is a matter of managerial discretion. See *Southern Pac. Co. Abandonment*, 317 I.C.C. 489, 493 (1962). As a practical result of such discretion, the revenues produced by traffic originated and/or terminated on an abandonment section and the expenses incident only to such traffic become the principal criteria in determining whether there exists a real need for the line's existence. See *Missouri Pac. R. Co. Abandonment*, 324 I.C.C. 357, 367 (1965).

In analyzing abandonment proceedings which involve overhead movements, the Commission has often expressed its view that carriers should be free to use their facilities in such a manner as they deem necessary for the promotion of efficiency and economy rather than for the purpose of maintaining a line which local shippers cannot support. See *Chicago, B. & Q. R. Co. Abandonment*, 271 I.C.C. 261, (1948).

It should be noted that in Ex Parte No. 274 (Sub-No. 2) *Abandonment of R. Lines & Discontinuance of Serv.*, 354 I.C.C. 129 (1976), "bridge traffic rerouting" costs are included as an avoidable cost item. However, on January 1, 1978, the Commission changed its regulations for calculating railroad freight and commuter service subsidies and for maintaining detailed accounting records at the branch line level. The regulations are being revised to conform with the Commission's new uniform system of accounts for railroads, which also went into effect on January 1, 1978. While these new regulations exclude bridge traffic rerouting costs as an avoidable cost item, we are obligated to apply the standards which were effective at the time this proceeding was heard.

There are two cost items to which proper exception was taken: the inclusion of the stations agent's portion of employee fringe benefits and fireman's wages. However, we are unable to follow Malta's mathematical calculation of the $1,612 figure for the first half of 1976, and no information was provided for 1975. The dispute over the inclusion of fireman's wages as an avoidable expense is not easily solved because the lack of detail on the record prevents us from extracting that expense accurately. The impact of these cost items, however, is minimal and does not prove that the branch line in issue was not operating at a loss.

We have considered the arguments that the Administrative Law Judge improperly accepted, (1) a figure of $23,274 as return on track and materials as part of the operating deficit, and (2) applicant's computation of off-branch costs on the basis of 50 percent of revenue earned off-branch on cars either originated or terminated on branch. We agree with Malta that return on investment should not properly be included in avoidable costs, but disagree that the variable unit cost method is improper.

We believe that, at this point, further tedious discussion of each costing point raised by the protestants would be counterproductive. Even if protestants were to be found accurate on every small costing point raised, they have still failed to prove that the initial decision was in error by finding that the branch line was operating at a loss.

There is only one modification to the initial decision with respect to costing that merits attention. The following words should be added as a footnote under the table on page 23 of the initial decision:

> Includes a station agent's fringe benefits, wages of the fireman and fringe benefits associated therewith, which are not acceptable as avoidable expenses. Due to lack of detail in the record we are unable to mathematically extract these expenses. However, the impact is minimal.

We have also considered engineering related exceptions. Protestants' contentions that the Administrative Law Judge erred in allowing the $23,166 for rehabilitation of 17.5 miles of line between Philo and Malta and in allowing $28,000 for the cost of maintenance following rehabilitation for the same segment of line are of no merit.

All other points raised and not discussed have been considered and found without merit.

Under the existing rate structure the applicant lost money by operating the line in question. The question of whether the applicable rates and/or divisions are compensatory or reasonable are not properly in issue and need not be reached.

We find that the evidence considered in the light of the exceptions does not warrant a result different from that reached by the Administrative Law Judge. The statement of facts, conclusions, and findings of the Administrative Law Judge, except as modified in this report are proper and correct in all material respects and are consistent with the applicable law. We also find that those statements of facts, conclusions, and findings should be affirmed and adopted as our own.

The parties are advised that this decision is administratively final under the provisions of section 17(9)(c) of the Interstate Commerce Act. Any further administrative appeal can be entertained only under section 17(9)(d) of the act which permits such an appeal only if the entire Commission finds that a matter of general transportation importance is involved, that clear and convincing new evidence has been presented, or that there exists changed circumstances which would materially affect this decision. Such appeal must be filed within 20 days of the date of service of this order.

It is ordered:

1. The initial decision of the Administrative Law Judge served August 25, 1977, as modified in this report, is adopted as the order of the Commission, Division 1.

2. The request for oral hearing as requested by protestant Malta Division is denied.

3. This decision shall be effective 30 days from the date it is served.

By the Commission, Division 1, Acting as an Appellate Division, Commissioners Brown, Gresham, and Christian.

DECISION

DOCKET NO. AB-126

WELLSVILLE, ADDISON & GALETON RAILROAD CORPORATION—ABANDONMENT OF ENTIRE LINE IN POTTER AND TIOGA COUNTIES, PENNSYLVANIA

On appeal, the public convenience and necessity found to permit the abandonment of entire line in Potter and Tioga Counties, PA.

An appeal to the report and order of the Commission, Review Board No. 5, dated September 30, 1977, which granted the abandonment application, was filed by the protestant, Pennsylvania Public Utility Commission (PPUC) on November 28, 1977. The Wellsville, Addison & Galeton Railroad Corporation (WAG) filed its reply on December 30, 1977.[1]

On April 21, 1976, WAG, a common carrier by railroad subject to part I of the Interstate Commerce Act (act), filed an application under section 1(18)-(20) of the act seeking a certificate of public convenience and necessity permitting abandonment of its entire line of railroad extending from Galeton, in Potter County, to Elkland, in Tioga County, a distance of approximately 31.5 miles, and from Gaines Junction to Ansonia, in Tioga County, a distance of approximately 8.5 miles, together with approximately 6,500 feet of siding, all in the State of Pennsylvania. The application was filed pursuant to then 49 CFR 1121.20-24, the "34-carload rule." Data submitted by WAG show that it shipped less than 34 cars per mile per year over the railroad since 1974. Additionally, WAG offered financial data as evidence of the unprofitability of its railroad operations. In 1975, the applicant showed total railway operating revenues of $77,799 (excluding $1,783 revenues from scrapping boxcars) and railway operating expenses of $307,080 for a total loss from operations of $229,281. WAG also leases boxcars to other railroads.

PPUC's contention on appeal is that WAG improperly used its railroad assets to acquire railcars for leasing purposes and that this freight car leasing operation is a burden on the railroad operation. It argues that the rail operations could be financially sound and that the review board should not have permitted the abandonment.

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[1] The reply was filed 1 day late. It will be accepted because there has been no showing that the PPUC will be in anyway prejudiced by such acceptance.

Specifically, PPUC states that the high costs associated with the acquisition and maintenance, including depreciation of railcars for lease may have inflated WAG's expenses because the offsetting revenues from the leasing operation were not considered part of WAG's total operation. PPUC also contends that WAG would be in a more financially viable position today had the railroad management chosen to use the revenues from (1) its car-leasing operation, (2) salvage of its car-leasing fleet, and (3) salvage of previously abandoned rail lines to repair the food-damaged track and thus prevented the deterioration of traffic.

PPUC states that WAG's expenses are overstated, and that WAG's management has overchanged its railroad operation to the benefit of its owners. In its verified statement, PPUC outlined some of the expenses which it alleges were inflated and contends that these matters were not adequately addressed by the board. PPUC generally questions the accounting practices that have been followed by the applicant in the past which have been approved by the Commission. Finally, PPUC contends that the board misconstrued the Commission's then applicable "34-carload rule."

WAG, in its reply, states that all revenue derived from the ownership of freight cars except for incentive per diem which could only be used to acquire new cars, went into the general account and was used to pay for the operation and maintenance of the boxcars and the railroad. It argues that without the revenues derived from the boxcars, it would not have been able to continue rail operations beyond 1967.

DISCUSSION AND CONCLUSION

We have considered the objections to the board's decision raised by the PPUC but are not persuaded by them.

PPUC is attempting to overturn the board's decision by questioning WAG's past management decisions and the effect of those past decisions upon WAG's current financial condition.

There is nothing in the record to sustain PPUC's contentions that the acquisition and maintenance (including depreciation) of railroad boxcars inflates the expenses of operating the rail line or that WAG's expenses are overstated. The decision to invest in the boxcars and lease them to other railroads was a management business judgment, and we cannot find that judgment was inconsistent with the public interest. Cf. *Southern Pac. Co. Abandonment*, 317 I.C.C. 489, 493.

In 1975 applicant showed total railway operating revenues of $77,699 (excluding $1,783 revenue on scrapped cars) and railway operating expenses of $307,080 for a loss from operations of $229,281. The WAG Annual Report to the Commission for 1975 shows railway operating revenues of $79,582 and railway operating expenses of $340,815 for a net loss from railway operations of $261,233. The addition of $114,393 for rental income from the leased freight cars and the subtraction of $147,434 in railway tax accruals increases the loss from railway operations to $294,274. Thus the revenues from hire of freight cars has been excluded from WAG's financial showing as contended by PPUC. However, WAG also excluded railway tax accruals and the net impact of these two exclusions is to increase the deficit by $33,041.

Both the $15,309 for flood damage and the $26,279 for loss on the sale of ties are properly included as maintenance of way and structure expenses. However, the $26,279 should have been included in Class II Account 2203 1/2 "Retirements-road" rather than in Account 2202 "Roadway maintenance." This minor error does not affect its inclusion as a proper historical expense in 1975.

The $38,500 for locomotive repair expenses is also acceptable, and the $5,000 for writeoff of obsolete parts is properly included in locomotive repairs. The remaining $33,500 for repair of three operating locomotives was the amount WAG reported it spent on these locomotives and protestant has offered no evidence which might prove otherwise.

The $33,735 claimed by applicant for freight train car repairs is properly classified as a maintenance-of-equipment expense. The $8,392 for repair of owned freight cars while on foreign lines is properly included in Class II Account 2226, "Cars and highway revenue equipment repairs." The $25,343 for stripping and preparing cars for shipment to scrap yards should have been included in Class II Account 2228, "Dismantling retired equipment." This recording error does not affect its inclusion as a proper historical expense for 1975.

WAG's general expenses and net rents have been properly recorded. WAG's expenses have all been classified in the proper major categories, *e.g.,* maintenance of way and structures, maintenance of equipment, traffic, transportation-rail line, miscellaneous operations and general. However, all expenses have not been shown to be of a recurring nature and thus not all may be claimed as avoidable expenses. Not shown to be recurring expenses are the $15,309 for flood damage, the $26,279 loss on the sale of ties, the $5,000 for writeoff of obsolete parts, the $8,392 for repair of freight cars on foreign lines, and the $25,343 for stripping and preparing these freight cars for shipment to scrap yard. These items total $80,323. Even though the $80,323 was a proper historical expense in 1975, it may not be used as a guide for judging future operating expenses since these expenses are of a nonrecurring nature. However, when we exclude the $80,323 from applicant's reported net loss of $229,281, the net loss on railroad operations would be reduced to $148,958. In sum we find no merit in PPUC's challenge to WAG's accounting procedures.

WAG raised the rebuttable presumption that there was no need for the line since less than 34 carloads per mile traveled over the line since 1974. PPUC argues that the board misinterpreted the effect of the presumption. However, the board recognized that the PPUC was able to rebut that presumption and decided the case under *Colorado* v. *United States*, 271 U.S. 153 (1926). Thus, the board correctly applied the statutory test of public convenience and necessity in granting WAG authority to abandon the line.

An environmental threshold assessment survey (TAS) has been prepared by the Commission and made available for public inspection. It found that no significant impact on the environment would result from approval of the application. By notice served January 10, 1977, based on the TAS, it was determined that no environmental impact statement need be issued in this proceeding as it does not represent a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969. Appropriate notice of such determination was published as directed. The Commission received comments which do not cause us to modify the previous conclusion.

Any contention and arguments not specifically discussed in this report have been considered and found to be without material significance.

We find that the continued operation of the line would impose an undue and unnecessary burden upon applicant and upon interstate commerce.

Subject to the same conditions for protection of employees as set forth in *Oregon Short Line R. Co.—Abandonment—Goshen*, 354 I.C.C. 76 (1977), we find that the present and future convenience and necessity permit abandonment by Wellsville, Addison &

Galeton Railroad Corporation of its entire line of railroad extending from Galeton, in Potter County, to Elkland, in Tioga County, a distance of approximately 31.5 miles, and from Gaines Junction to Ansonia, in Tioga County, a distance of approximately 8.5 miles, together with approximately 6,500 feet of siding, all in the State of Pennsylvania.

COMMISSIONER STAFFORD was absent and did not participate.

It is ordered:

1. The appeal filed by the Public Utilities Commission of Pennsylvania is denied.
2. The report and order of Review Board No. 5, served October 28, 1977, as amplified by our decision, shall be effective 30 days from the date this decision is served.

Decided March 16, 1978.

By the Commission, Division 2, Commissioners Stafford, Murphy, and Clapp.

EX PARTE NO. 274 (SUB-NO. 2)

ABANDONMENT OF RAILROAD LINES AND DISCONTINUANCE OF SERVICE

November 1, 1976

NOTICE

The Interstate Commerce Commission,[1] on October 29, 1976, adopted the accompanying order and regulations governing the abandonment of railroad lines and the discontinuance of rail service. The regulations, which will appear as 49 CFR part 1121, are being filed today with the Office of the Federal Register for publication. A report discussing the regulations and containing the Commission's reasons for their adoption is found at 354 I.C.C. 129 (1976).

ROBERT L. OSWALD,
(SEAL) *Secretary.*

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 29th day of October 1976.

EX PARTE NO. 274 (SUB-NO. 2)

ABANDONMENT OF RAILROAD LINES AND DISCONTINUANCE OF SERVICE

Investigation of the matters and things involved in this proceeding having been made and the Commission, on the date hereof, having adopted certain regulations (embodying determinations by the Rail Services Planning Office as provided in section 205(e)(1)(B) of the Regional Rail Reorganization Act of 1973, as amended, to determine the "avoidable cost of providing rail freight service" as that phrase is used in section 1a(6)(a)(ii)(A) of the Interstate Commerce Act, as amended), which regulations are hereby referred to and made a part hereof:

It is ordered, That Part 1121 of Title 49 of the Code of Federal Regulations be, and it is hereby, amended as set forth in the regulations attached hereto;

It is further ordered, That this order shall become effective on November 1, 1976.

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy thereof in the Office of the Secretary of the Commission at Washington, D.C., and by filing a copy with the Director, Office of the Federal Register.

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[1] Commissioners Murphy and O'Neal did not participate.

By the Commission, Commissioners Murphy and O'Neal not participating.

REGULATIONS

49 CFR Part 1121

Part 1121—Abandonment of railroad lines and discontinuance of service

SUBPART A—GENERAL

Sec.

1121.10 Purpose of scope.
1121.11 Definitions.

SUBPART B—SYSTEM DIAGRAM

1121.20 System diagram map.
1121.21 Description of lines to accompany the system diagram map.
1121.22 Filing and publication.
1121.23 Amendment of the system diagram map.
1121.24 Availability of data.
1121.25 Reservation of jurisdiction.

SUBPART C—PROCEDURES GOVERNING NOTICE, APPLICATIONS, FINANCIAL ASSISTANCE, AND ACQUISITION FOR PUBLIC USE

1121.30 Notice of intent to abandon line or discontinue service.
1121.31 Form of notice.
1121.32 Contents of application.
1121.33 Summary application.
1121.34 Filing and service of application.
1121.35 [Reserved]
1121.36 Participation in abandonment or discontinuance proceedings.
1121.37 Commission determination and certification under section 1a(3) of the act.
1121.38 Financial assistance procedures.
1121.39 Public use procedures.

SUBPART D—STANDARDS FOR DETERMINING COSTS, REVENUES, AND RETURN ON VALUE

1121.40 General
1121.41 Revenues attributable to the rail properties.
1121.42 Avoidable costs of providing service.
1121.43 Valuation of rail properties.
1121.44 Reasonable return.
1121.45 Submission of revenue and cost data.
1121.46 Financial status report.

Authority: Section 205(e)(1)B) of the Regional Rail Reorganization Act of 1973, Public Law 23-236, 87 Stat. 985, 994, as amended by section 309 of the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210, 90 Stat. 31, 57; and sections 1 and 1a of the Interstate Commerce Act as amended by sections 801, 802, and 809 of the Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 31, 127 through 130, and 144, and section 218 of the Rail Transportation Improvement Act, Public Law 94-555, 90 Stat. 2613.

SUBPART A—GENERAL

Section 1121.10—Purpose and scope

(a) Section 1(18) of the Interstate Commerce Act (act) as amended, governs the extension, construction, and acquisition of lines by common carriers by railroad. Regulations under that section are set forth at 49 CFR 1120. Section 1a of the act governs abandonments of rail lines and discontinuance of rail service by common carriers. Section 1a provides that no line of railroad shall be abandoned and no rail service discontinued unless the Commission shall have issued a certificate of public convenience and necessity authorizing such abandonment or discontinuance.

(b) Part 1121 contains regulations governing abandonment of and discontinuance of service over rail lines. Part 1121 also sets forth procedures for providing financial assistance to assure continued rail freight service and for acquisition of rail lines for alternative public use. Subpart A contains definitions and a statement of purpose and scope of the regulations. Subpart B requires each common carrier by railroad subject to part I of the act to file a full and complete diagram of the transportation system operated, directly or indirectly, by such carrier. The diagram shall be accompanied by a detailed description of certain of the carrier's lines of railroads. Subpart C specifies the notice, filing, and processing requirements for abandonment or discontinuance applications, offers of financial assistance, and offers of acquisition for public use. Subpart D establishes standards for use in evaluation of abandonment and discontinuance applications and for determination of rail freight service continuation assistance.

Section 1121.11—Definitions

Unless otherwise required by the context, the following definitions apply in this part:

(a) "Account" means an account in the Commission's Uniform System of Accounts for Railroad Companies (49 CFR Part 1201).

(b) "Act" means the Interstate Commerce Act (49 U.S.C. 1 *et seq.*) as amended.

(c) "Base year" means the latest 12-month period, ending no later than 6 months prior to the filing of the abandonment or discontinuance application, for which data has been collected at the branch level as prescribed in section 1121.40(b).

(d) "Branch" means a segment of line for which an application for a certificate of abandonment or discontinuance, pursuant to section 1a of the act, has been filed.

(e) "Carrier" means a railroad company or the trustee or trustees of a railroad company subject to regulation under part I of the act.

(f) "Commission" means the Interstate Commerce Commission.

(g) "Designated state agency" means the instrumentality created by a State or designated by appropriate authority to administer or coordinate its State rail plan as required by section 5(j)(2) of the Department of Transportation Act (49 U.S.C. 1654), or regulations promulgated pursuant thereto.

(h) "Form R-1" means the railroad's annual report filed with the Commission in accordance with the requirements of section 20 of the act.

(i) "Offeror" means a shipper, a State, the United States, a local or regional transportation authority, or any financially responsible person offering rail service continuation assistance under section 1a(6)(a) of the act.

(j) "Office" means the Rail Services Planning Office established by section 205 of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 715) as amended.

(k) "Rail Act" means the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210 (90 Stat. 31).

(l) "Rail Form A" means the Commission's Formula for Use in Determining Rail Freight Service Costs, Statement 1F1-73.

(m) "Significant user" means (1) each of the 10 rail patrons which originated and/or received the largest number of carloads (or each patron if there are less than 10), and (2) any other rail patron which originated and/or received 50 or more carloads, on the line proposed for abandonment or discontinuance, during the 12-month period preceding the month in which notice is given of the abandonment or discontinuance application.

(n) "Subsidy year" means any 12-month period for which a subsidy agreement has been negotiated and is in operation.

SUBPART B—SYSTEM DIAGRAM

Section 1121.20—System diagram map

(a) Each carrier shall prepare a diagram of its rail system on a map, designating all lines in its system by the categories established in paragraph (b) of this section.

(b) All lines in each carrier's rail system shall be separated into the following categories:

(1) All lines or portions of lines which the carrier anticipates will be the subject of an abandonment or discontinuance application to be filed within the 3-year period following the date upon which the diagram, or any amended diagram, is filed with the Commission;

(2) All lines or portions of lines potentially subject to abandonment which the carrier has under study and believes may be the subject of a future abandonment application because of either anticipated operating losses or excessive rehabilitation costs, as compared to potential revenues;

(3) All lines or portions of lines for which an abandonment or discontinuance application is pending before the Commission on the date upon which the diagram, or any amended diagram, is filed with the Commission;

(4) All lines or portions of lines which are being operated under the rail service continuation provisions of section 1a(6)(a) of the act or of section 304(c)(2) of the Regional Rail Reorganization Act of 1973, as amended, on the date upon which the diagram, or any amended diagram, is filed with the Commission; and

(5) All other lines or portions of lines which the carrier owns, and operates, directly or indirectly.

(c) The system diagram map shall be color-coded to show the five categories of lines as follows:

(1) Red shall designate those lines described in section 1121.20(b)(1);
(2) Green shall designate those lines described in section 1121.20(b)(2);
(3) Yellow shall designate those lines described in section 1121.20(b)(3);
(4) Brown shall designate those lines described in section 1121.20(b)(4); and
(5) Black or dark blue shall designate those lines described in section 1121.20(b)(5).

(d) Each carrier shall also prepare and submit to the Commission a black and white version of the system diagram map and accompanying line descriptions which clearly identify each of the five categories of line and are suitable for publication in the Federal Register, in accordance with appendix A.

(e) The system diagram map shall also identify, and shall be drawn to a scale sufficient to depict clearly, the location of:

(1) All State boundary lines;

(2) Boundaries of every county in which is situated a rail line owned or operated by the carrier which is listed in categories 1 through 4 (section 1121.20(b)(1) through (4)).

(3) Every Standard Metropolitan Statistical Area (SMSA) any portion of which is located within 5 air miles of a rail line owned or operated by the carrier; and

(4) Every city outside an SMSA which has a population of 5,000 or more persons (according to the latest published United States census reports) and of which any portion is located within 5 air miles of a rail line owned or operated by the carrier. A series of interrelated maps may be utilized where the system serves a very large or congested area. An explanation of the interrelationship must be furnished.

Section 1121.21—Description of lines to accompany the system diagram map.

Each carrier shall list and describe, separately by category and within each category by State, all lines or portions of lines identified on its system diagram map as falling within categories 1 through 3 (section 1121.20(b)(1) through (3)) as follows:

(a) Carrier's designation for each line (for example, the Zanesville Secondary Track);

(b) State or States in which each line is located;

(c) County or counties in which each line is located;

(d) Mileposts delineating each line or portion of line; and

(e) Agency or terminal stations located on each line or portion of line with milepost designations.

Section 1121.22—Filing and publication.

(a) Each carrier shall file with the Commission six copies of its color-coded system diagram map (identified by its "AB number" as set forth in appendix B hereto) and of the accompanying line descriptions. The initial system diagram map and descriptions shall be filed within 180 days after the effective date of these regulations.

(b) The color-coded system diagram map and accompanying line descriptions shall be served upon the Governor, the Public Service Commission (or equivalent agency) and the designated State agency in each State within which the carrier operates or owns a line of railroad.

(c) The Commission shall publish a black and white version of the initial system diagram map as submitted in accordance with section 1121.20(d) and accompanying line description in the Federal Register. The carrier shall (i) publish in a newspaper of general circulation in each county within which is located a line in category 1 through 3 (section 1121.20(b)(1)-(3)) a notice containing a black and white copy of the system diagram map (or of a portion of the map clearly depicting its lines in such county) and a description of each such county) and a description of each such line; (ii) post a copy of the newspaper notice in each agency station or terminal on each line in category 1 through 3 (section 1121.20(b)(1)-(3)) or, if there is no agency station on the line, at any station through which business for the line is received or forwarded, and (iii) furnish, at reasonable cost, upon request of any interested person a copy of its color-coded or black and white system diagram map and the publication in the county newspaper shall so indicate.

(d) Each carrier shall file with the Commission an affidavit of service and publication stating the date each was accomplished. A copy of each newspaper notice published shall be attached to the affidavit. The effective date of the filing of the initial system diagram map as required in paragraph (a) of this section shall be deemed to be the date upon which the Commission receives the adfidavit required in this paragraph.

(e) The Commission shall require republication of the notice if it is found to be inadequate.

Section 1121.23—Amendment of the system diagram map.

(a) Each carrier shall be responsible for maintaining the continuing accuracy of its system diagram map and the accompanying line descriptions. Amendments may be filed at any time and will be subject to all carrier filing and publication requirements of section 1121.22.

(b) Every system diagram listing a line in category 2 (section 1121.20(b)(2)) shall be revised annually. Each annual revision shall clearly reflect the carrier's decision whether to transfer each such line to category 1 or 5 (section 1121.20(b)(1) or (5)) or to retain the line in category 2 for further study.

(c) Each carrier shall file with the Commission, at the time it files its annual report required by part 1241 of this title:

(1) An amended and updated color-coded system diagram map and line descriptions which shall be subject to the filing and publication requirements of section 1121.22; or

(2) A verified statement by a corporate officer having authority to so certify that no change has occurred in the categories of lines shown on its most recently filed system diagram map and accompanying descriptions.

(d) Under section 1a(5)(b) of the act, the Commission is precluded from issuing a certificate of abandonment or discontinuance if the abandonment or discontinuance application is opposed by a significant user, a State, or a political subdivision of a State unless the line involved is identified and described on the system diagram map for at least 4 months prior to the filing of such application. The 4-month minimum notice period of section 1a(5)(b) will be deemed to have commenced only for a line or portion of a line which is designated on the carrier's system diagram map as a line in category 1 (section 1121.20(b)(1)).

Section 1121.24—Availability of data.

Each carrier shall provide to the designated State agency, upon request, information concerning the net liquidation value (as defined in section 1121.43(c) of this part) of any line placed in category 1 (section 1121.20(b)(1)) on its system diagram map or line description, together with a description of such a line and any appurtenant facilities and of their condition.

Section 1121.25—Reservation of jurisdiction.

Section 1a(5)(a) of the act authorizes the Commission, at its discretion, to provide for designation of lines as "potentially subject to abandonment" under standards which vary by region of the Nation, by railroad, or by group of railroads. The

Commission expressly reserves the right to adopt such varying standards in the future.

SUBPART C—PROCEDURES GOVERNING NOTICE, APPLICATIONS, FINANCIAL ASSISTANCE, AND ACQUISITION FOR PUBLIC USE

Section 1121.30—Notice of intent to abandon line or discontinue service.

(a) The applicant shall give notice of its intent to file an abandonment or discontinuance application by (1) serving notice on the Commission, on those shippers who are significant users (as defined in section 1121.11(m) of this part) of the line proposed to be abandoned or discontinued, on the Governor (by certified mail), on the Public Service Commission (or equivalent agency), and on the designated State agency of each State in which all or part of the line of railroad sought to be abandoned or over which service is proposed to be discontinued is situated, (2) posting the notice in a conspicuous place at each agency station and terminal on the line proposed to be abandoned or discontinued (if there is no agency station on the line, the notice shall be posted at any agency station through which business for the line is received or forwarded), and (3) publishing the notice at least once during each of 3 consecutive weeks in a newspaper of general circulation in each county in which any part of the line of railroad proposed to be abandoned or discontinued is situated.

(b) The posting and publication requirements of paragraph (a) must be completed within the 30 day period prior to the actual filing of the application. Service must be completed at least 15 days prior to the actual filing date.

Section 1121.31—Form of Notice.

The notice of intent to abandon or to discontinue service shall be in the following form:

No. AB (Sub-No.)

NOTICE OF INTENT TO ABANDON OR TO DISCONTINUE SERVICE

(Name of Applicant) hereby gives notice that on or about (insert date application will be filed with the Commission) it intends to file with the Interstate Commerce Commission, Washington, D.C., 20423, an application for a certificate of public convenience and necessity permitting the abandonment of (the discontinuance of service on) a line of railroad known as————————————extending from railroad milepost ————————— near (station name) to (the end of line or rail milepost) near (station name), a distance of ————— miles, in ——————————— County(ies), State(s). The line for which the abandonment (or discontinuance) application will be filed includes the stations of (list all stations on the line in order of milepost number, indicating milepost location).

The reason(s) for the proposed abandonment (or discontinuance) is (are)——————————————— (explain briefly and plainly why the proposed action is being undertaken by the applicant).

This line of railroad has appeared on the system diagram map in category 1 (section 1121.20(b)(1)) since (insert date).

The interest of railroad employees will be protected by (specify the appropriate conditions).

Any interested person, in response to this notice, is entitled to take either of the following actions:

1. File with the Interstate Commerce Commission written comments containing:

(a) Exact name and address of the commenting party;
(b) Brief statement of interest in the abandonment or discontinuance proceeding;
(c) Specific statement of position and summary of evidence with regard to any or all of the following:

(1) Intent to offer financial assistance;
(2) Environmental impact;
(3) Impact on rural and community development;
(4) Suitability of the properties for other public purposes; and
(5) Recommended provisions for protection of the interests of employees.

Written comments will be considered by the Commission in all proceedings in developing conditions and in determining whether to conduct an investigation on its own motion. In the event an investigation is conducted, then the commenting party may participate in the proceeding as its interests may appear.

2. File with the Interstate Commerce Commission a petition requesting that the application and proposed abandonment (or discontinuance) be investigated.

The petition to investigate shall be in the form of a verified statement, and at minimum, contain:

(a) Identification of petitioner including its name, address, and business;
(b) Statement of petitioner's interest in the abandonment or discontinuance proceeding; whether petitioner uses the involved service; and if it does not, information with respect to the group or public interest it represents;
(c) Specific reason(s) for requesting the institution of an investigation, including information with respect to petitioner's reliance on the involved service, with allegations of fact supported by an affidavit of personal knowledge of the facts;
(d) Any rebuttal of information or material submitted by applicant; and
(e) Request for oral hearing and reasons, therefore, if desired.

Upon receipt of a petition to investigate, the Commission shall determine the extent of the investigation to be instituted. Those parties filing petitions to investigate should be prepared to participate actively in either oral hearings or via the submission of additional material in the form of verified statements. Parties seeking information concerning the filing of petitions should refer to 49 CFR 1121.36.

Petitions to investigate and written comments should indicate the proceeding designation No. AB- (Sub-No.) and should be filed with the Interstate Commerce Commission, Washington, D.C. 20423, no later than (insert the date 35 days after the date applicant intends to file its application). Interested persons may file either a written comment or a petition to investigate with the Commission to become a party to this abandonment (or discontinuance) proceeding. A copy of each petition to investigate or written comment shall be served upon the representative of the applicant (insert name and address). Replies to comments or petitions, the latter shall be in the form of a verified statement, shall be filed with the Commission no later than (insert the date 45 days after the date applicant intends to file its application) and shall be served on all commenting parties and petitioners. The original and two copies of all petitions, comments and replies shall be filed with the Commission together with a certificate of service.

In the event a petition to investigate prepared in accordance with the above instructions is filed, then the Commission will conduct an investigation of the abandonment (or discontinuance). Written comments filed with the Commission will be considered by the Commission in all proceedings in developing conditions and in determining whether the Commission should conduct an investigation on its own motion in the event no petition to investigate is filed. Additionally, if an investigation is conducted then parties filing comments may participate in the investigation as their interests may appear.

Persons desiring further information concerning abandonment procedures may contact the Interstate Commerce Commission's Section of Finance, Office of Proceedings or refer to the full abandonment and discontinuance regulations at 49 CFR 1121. Persons desiring information concerning financial assistance for the continued operation or acquisition of the involved line should contact the Commission's Rail Services Planning Office. The carrier's representative to whom inquiries may be made is . A copy of the application will be available for public inspection on or after (insert date abandonment application is to be filed with Commission) at each agency station or terminal on the line proposed to be abandoned or discontinued (if there is no agency station on the line, the application shall be deposited at any agency station through which business for the line is received or forwarded) [insert name, address, location and business hours]. The carrier shall furnish a copy of the application to any interested person proposing to file a written comment or petition to investigate, upon request.

Section 1121.32—Contents of application.

Applications for certificates of public convenience and necessity permitting the abandonment of railroad lines or the discontinuance of rail service shall contain the following information and each subsection (a) through (i) shall be attested to by a person having personal knowledge of the matters contained therein:

(a) *General*

(1) Exact name of applicant.

(2) Whether applicant is a common carrier by railroad subject to the Interstate Commerce Act.

(3) Whether the carrier which owns or operates the lines of railroad to be abandoned or over which service is to be discontinued is a part of any railroad system.

(4) Relief sought (abandonment of line or discontinuance of service).

(5) Proposed effective date of abandonment or discontinuance.

(6) Detailed map of the subject line on a sheet not larger than 8 x 10 1/2 inches, drawn to scale, and with the scale shown thereon. The map must show, in clear relief, the exact location of the rail line to be abandoned or over which service is to be discontinued and its relation to other rail lines in the area, highways, water routes, and population centers.

(7) Reference to inclusion of the rail line to be abandoned or over which service is to be discontinued on the carrier's system diagram map, in compliance with section 1121.20-.23, and the date upon which such line was first listed on the system diagram map as potentially subject to abandonment in accordance with section 1121.20(b)(1). A copy of the line description which accompanies the system diagram map shall also be submitted.

(8) Detailed statement of reasons for filing application.

(9) Name, title, and address of representative of applicant to whom correspondence should be sent.

(b) *Condition of properties*

(1) The present physical condition of the line including any operating restrictions and estimate of deferred maintenance and rehabilitation costs (*e.g.*, number of ties that need replacing, miles of rail that need replacing and/or new ballast, bridge repairs or replacement needed, and estimated labor expenses necessary to upgrade the line to minimum Federal Railroad Administration Class I safety standards). The bases for the estimates shall be stated with particularity, and workpapers shall be made available upon request of the Commission or any interested person.

(2) Statement whether the line, or any portion of line, could be operated profitably if necessary deferred maintenance and rehabilitation were performed.

(c) *Service provided*

Description of the service performed on the line during each of the 2 calendar years immediately preceding the filing of the application, for that part of the current year for which information is available, and for the base year (as defined by section 1121.11(c)), if different, including the actual:

(1) Number of trains operated and their frequency.

(2) Miles of track operated (include main line and all railroad-owned sidings).

(3) Average number of locomotive units operated.

(4) Carload commodity group tonnage on the line.

(5) Overhead or bridge traffic by carload commodity group tonnage (include detailed information on overhead or bridge traffic to be retained by the carrier).

(6) Average crew size.

(7) Level of maintenance.

(8) Any important changes in train service undertaken in the 5 calendar years immediately preceding the filing of the application.

(9) Reasons for decline in traffic, if any, in the best judgment of applicant.

(d) *Revenue and cost data*

(1) Computation of the revenues attributable, avoidable costs, and reasonable return on value for the line to be abandoned for the base year (as defined by section 1121.11(c)) in accordance with the methodology prescribed in section 1121.41-.44, as applicable, and submitted in the form called for in section 1121.45, as exhibit 1.

(2) The same computation shall be made for the 2 years immediately preceding the base year using data collected at the branch level to the extent available and otherwise allocating system revenues and expenses to the line. The bases for any such allocations shall be stated with particularity.

(3) The carrier shall also compute an "Estimated Subsidy Payment" for the base year in the form called for in exhibit 1 and an alternate payment to reflect (A) increases or decreases in attributable revenues and avoidable costs projected for the subsidy year and (B) an estimate, in reasonable detail, of the cash income tax reductions, Federal and State, to be realized in the subsidy year. The bases for the adjustments, *e.g.*, rate increase, changes in traffic level, necessary maintenance to comply with minimum Federal Railroad Administration Class I safety standards, shall be stated with particularity.

(4) If the line to be abandoned or over which service is to be discontinued is less than the entire mileage owned or operated by the carrier, a detailed statement showing the effect of the proposed abandonment or discontinuance on its net railway operating income for each of the 2 calendar years immediately preceding the filing of the application and for that part of the current year for which information is available.

(5) If the line to be abandoned or over which service is to be discontinued is operated as a part of a system under common control and management, a detailed statement showing the effect of the proposed abandonment or discontinuance on the net railway operating income of the other individual members of the system for each of the 2 calendar years immediately preceding the filing of the application and for that part of the current year for which information is available.

(e) *Rural and community impact*

(1) The name and population (identify source and date of figures) of each community in which a station on the line is located.

(2) Identification of significant users, as defined in section 1121.11(m), by name, address, principal commodity, and by tonnage and/or carloads for each of the 2 calendar years immediately preceding the filing of the abandonment or discontinuance application and for that part of the current year for which information is available.

(3) Detailed description of the alternate sources of transportation service (rail, motor, water, air) available, including a detailed description and nature of operations, and the highway network in the proximate area.

(4) Statement of efforts which have been made to continue service through solicitation of additional traffic, and the sale or subsidy of the line and the results of those efforts.

(5) Statement of whether the properties proposed to be abandoned are suitable for use for other public purposes, including roads or highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the applicant is aware of any restriction on the title to the property, including any reversionary interest, which would affect the transfer of title or the use of property for other than rail purposes, this shall be disclosed.

(f) *Environmental impact*

The applicant shall submit as a part of its abandonment or discontinuance application full and complete information with regard to the environmental impact of the proposed abandonment or discontinuance in compliance with 49 CFR 1108.12(b) and (c). If certain information required by the environmental regulations duplicates wholly or in part information required elsewhere in an abandonment or discontinuance application, the environmental information requirements may be met by a direct and specific reference to the location of the required information elsewhere in the abandonment or discontinuance application.

(g) *Passenger service*

If passenger service is provided on the line, a statement of whether appropriate steps have been taken for discontinuance pursuant to sections 13a(1) and (2) of the act, as amended, or the Rail Passenger Service Act, as amended.

(h) *Financial statements*

(1) Carrier's general balance sheet as of the latest date available.

(2) Carrier's income statement for each of the 2 calendar years immediately preceding the filing of the application for abandonment or discontinuance and for that portion of the current year for which information is available.

(i) ***Additional information***

The applicant shall submit such additional information to support its application as the Commission may require.

(j) ***Verification***

The original application shall be executed and verified in the form set forth below by an officer of the carrier having knowledge of the facts and matters relied upon.

VERIFICATION

State of ______________________ ss.

County of ______________________

____

(Name of affiant)

makes oath and says that he is the ______________________

______________________ of the ______________________

(Title of affiant) (Name of applicant)

applicant herein; that he has been authorized by the applicant (or as appropriate, a court) to verify and file with the Interstate Commerce Commission the foregoing application in AB- (Sub-No.); that he has carefully examined all of the statements in the application as well as the exhibits attached thereto and made a part thereof; that he has knowledge of the facts and matters relied upon in the application; and that all representations set forth therein are true and correct to the best of his knowledge, information, and belief.

____

(Signature)

Subscribed and sworn to before me ______________________

in and for the State and County above named, this day of , 19 .

____

My commission expires ______________________

Section 1121.33—Summary application

(a) If the applicant anticipates no substantial or material opposition to an application for abandonment or discontinuance, it may omit from the application the information required under section 1121.32, except that required under paragraphs (a), (d)(3), (e), (f), and (i) of that section. All notice and publication requirements of section 1121.30, .31, and .34 must be followed for a summary application.

(b) A summary application must contain a certification that applicant is not aware of any substantial and material objection to the application.

(c) If an investigation is ordered to be conducted (section 1121.37) of a summary application, the applicant must file the remainder of the information required in a standard long-form application under section 1121.32 within 60 days of the service date of the Commission's order instituting the investigation. The actual date of filing of the application, as supplemented, for the purposes of complying with all statutory timetables, shall be deemed to be the date upon which such additional complete information is received by the Commission.

(d) If the information necessary to complete a summary application which has been made the subject of an investigation is not received by the Commission within the 60-day period under paragraph (c) of this section, the summary application may not be refiled prior to 1 calendar year from the service date of the order of dismissal.

(e) A check or money order payable to the Interstate Commerce Commission must be submitted with the application to cover the applicable filing fee, which in the case of a summary application shall be 25 percent of the filing fee for a standard long-form application. If a summary application is later supplemented pursuant to paragraph (c) of this section, the remaining 75 percent of the full filing fee must be submitted with the supplementary materials.

Section 1124.34—Filing and service of application

(a) An original and six copies of applications, typewritten, or printed on paper approximately 8 1/2 inches by 11 inches with 1 1/2 inch left margin shall be filed with the Secretary of the Interstate Commerce Commission, Washington, D.C. 20423. The original shall bear the date and signature and shall be complete in itself; the signature may be stamped or typed and the notarial seal may be omitted on the copies. A check or money order payable to the Interstate Commerce Commission must also be submitted to cover the applicable filing fee.

(b) The applicant shall tender with its application an affidavit attesting to its compliance with the notice requirement of section 1121.30. The affidavit shall include the dates of service, posting, and publication of the notice.

(c) When the application is filed with the Commission, the applicant shall serve, by first-class mail, a copy on the Governor, the Public Service Commission (or equivalent agency), and the designated State agency of each State in which any part of the line of railroad sought to be abandoned or discontinued is situated, and on the Commission's Rail Services Planning Office. A copy of the application will be available for public inspection, on or after the date the abandonment application is filed with the Commission, at each agency station or terminal on the line proposed to be abandoned or discontinued (if there is no agency station on the line, the application shall be deposited at any agency station through which business for the line is received or forwarded). A certificate or service shall be promptly filed with the Commission.

(d) The applicant shall promptly furnish by first-class mail a copy of the application to any interested person proposing to file a written comment or petition to investigate upon request. A certificate of service shall promptly be filed with the Commission.

(e)(1) The Commission shall reject any abandonment or discontinuance application which does not substantially conform to the regulations in this subpart C regarding notice, form, and content or which applies to a line which has not properly been published on the carrier's system diagram map in conformance with the regulations of subpart B.

(2) Upon the filing of an abandonment or discontinuance application, the Commission will review the application and determine whether it conforms with all applicable regulations. If the application is substantially incomplete or its filing otherwise defective, the Commission shall reject the application for stated reasons by order (which order will be administratively final) within 20 days from the date of filing of the application.

(3) A revised application may be submitted, and the Commission will determine whether the resubmitted application conforms with all prescribed regulations. A properly revised application submitted within 60 days of the order rejecting the incomplete or improper application need not be subjected to new notice and

publication under section 1121.30, unless the defect causing the rejection was in the notice and/or publication. A revised application submitted after such 60-day period must be newly published and noticed.

(4) The resubmission of an abandonment or discontinuance application shall be considered a *de novo* filing for the purposes of computation of the time periods prescribed in section 1a of the act *provided* that a resubmitted application is deemed complete and proper.

Section 1121.35—[Reserved]

Section 1121.36—Participation in abandonment or discontinuance proceedings.

(a) Interested persons may become parties to an abandonment or discontinuance proceeding by filing with the Commission one or both of the following:

(1) Petition to investigate which shall be in the form of a verified statement, and at minimum, contain:

(i) Identification of petitioner including its name, address, and business;

(ii) Statement of petitioner's interest in the abandonment or discontinuance proceeding; whether the petitioner uses the involved service; and if it does not, information with respect to the group or public interest it represents;

(iii) Specific reason(s) for requesting the institution of an investigation, including information with respect to petitioner's reliance on the involved service, with allegations of fact supported by an affidavit of personal knowledge of the facts;

(iv) Any rebuttal of information or material submitted by the applicant; and

(v) Request for oral hearing and reasons therefor, if desired. Upon receipt of a petition to investigate, the Commission shall determine the extent of the investigation to be instituted. Those parties filing petitions to investigate should be prepared to participate actively in either oral hearings or via the submission of additional material, in the form of verified statements.

(2) Written comments which shall, at a minimum, contain:

(i) Exact name and address of commenting party;

(ii) Brief statement of interest in the abandonment or discontinuance proceeding;

(iii) Recommendations to the Commission with regard to approval, disapproval, or other specified action on the abandonment or discontinuance application;

(iv) Specific statement of position and summary of evidence with regard to any or all of the following:

(A) Intent to offer financial assistance;

(B) Environmental impact;

(C) Impact on rural and community development;

(D) Suitability of the properties for other public purposes; and

(E) Recommended provisions for protection of the interests of employees.

Written comments will be considered by the Commission in proceedings in developing conditions and in determining whether to conduct an investigation on its own motion. In the event a formal investigation is conducted, then the commenting parties may participate in the proceeding as their interest may appear.

(b) *Employee or employee representative participation.*

(1) In each abandonment or discontinuance proceeding in which the application is granted, employee protective conditions at least as beneficial to the interests of

employees as provisions established pursuant to section 5(2)(f) of the act and pursuant to section 405 of the Rail Passenger Service Act shall be imposed;

(2) Employees or their representatives need not file petitions to investigate or comments because the Commission will impose in each proceeding the provisions for the protection of interests of employees pursuant to section 1a(4); and

(3) Employees or their representatives may state their positions on every aspect of an abandonment or discontinuance proceeding by filing written comments.

(c) *Filing and service of petitions to investigate, written comments, and replies to written comments.*

(1) Petitions to investigate and written comments shall be filed with the Commission within 35 days of the filing with the Commission of an abandonment or discontinuance application. The proposed date of filing of an abandonment or discontinuance application shall be included in the notice of intent required in section 1121.30-31.

(2) An original and 2 copies of each petition to investigate and each written comment shall be filed with the Commission.

(3) A copy of each petition to investigate and each written comment shall also be served on applicant or its representative at the time of filing with the Commission. Each petition or comment shall contain a certificate of service.

(4) Replies to written comments and petitions to investigate may be filed. Replies to petition for investigation shall be in the form of verified statement. Replies shall be served on all commenting and petitioning parties. An original and two copies of such replies shall be filed no later than 45 days from the date the application is filed.

Section 1121.37—Commission determination and certification under section 1a(3) of the act

(a) *Order causing an investigation to be instituted and conducted.*

(1) Upon receipt of a petition to investigate the Commission shall determine the nature and extent of the investigation to be instituted in the abandonment or discontinuance application.

(2) If no petition to investigate is filed with the Commission under section 1121.36, the Commission may, on its own initiative, order that an investigation be conducted.

(3) A copy of the order instituting an investigation of an abandonment or discontinuance application shall be served by the Commission on the carrier which owns or operates the line of railroad involved or its representative not later than 55 days after date upon which the application was filed with the Commission. Copies of such order shall also be mailed by the Commission to all parties which filed petitions to investigate or written comments and to all persons upon which copies of the application are required to be served under section 1121.34(c).

(4) The order instituting an investigation shall also order the postponement, in whole or in part, of the proposed effective date of the abandonment or discontinuance.

(5) Subsequent to the order instituting an investigation, the Commission may issue an order designating the abandonment or discontinuance application to be the subject of an oral hearing or to be considered under the modified procedure.

(b) If no investigation is instituted, the Commission shall issue a certificate 60 days after the filing date of an abandonment or discontinuance application.

(1) Such certificate shall state that the present and future public convenience and necessity require or permit the proposed abandonment or discontinuance.

(2) Because such certificate may only be issued in accordance with all provisions of section 1a of the act, such certificate will not be immediately effective and will be conditioned as follows:

(i) Provisions for protection of the interests of employees of the owning or operating railroad, consistent with section 1a(4) of the act, will be imposed in each such certificate;

(ii) Each such certificate shall specify a date prior to which abandonment of the line or discontinuance of service shall not take effect, pursuant to section 1a(4) of the act;

(iii) Each certificate shall state that such certificate will not be finally issued and effective until all interested persons have had full opportunity to offer financial assistance to assure continued rail service and to execute a financial assistance agreement for either acquisition or operation, pursuant to section 1a(6) of the act; and

(iv) If the Commission finds, pursuant to section 1a(10) of the act as a result of information submitted in written comments and its own analysis, that the properties to be abandoned or over which service is to be discontinued are suitable for use for other public purposes, the certificate shall require that the properties not be sold, leased, exchanged, or otherwise disposed of except in accordance with reasonable terms and ,conditions prescribed therein by the Commission. Such terms and conditions may include, but are not limited to, a prohibition on disposal for a period not to exceed 180 days from the date of issuance of the certificate unless such properties have been offered, upon reasonable terms, for acquisition for public purposes.

(3) Upon satisfactory completion of the requirements of any conditions imposed in such certificate, a final order of the Commission shall be entered—

(i) Issuing a final and effective certificate;

(ii) Postponing the issuance of a final and effective certificate for the period of a financial assitance agreement executed under section 1a(6) of the act and pursuant to section 1121.38 of this subpart; or

(iii) Otherwise directing full compliance with section 1a of the act.

(4) Such a certificate issued without investigation shall not be effective to authorize actual abandonment or discontinuance until after issuance of a final order of the Commission.

Section 1121.38—Financial assistance procedures

(a) In any proceeding in which the Commission finds, after investigation or without such investigation, that the present and future public convenience and necessity permit or require the proposed abandonment or discontinuance of rail service, the Commission will, prior to the issuance of an effective certificate authorizing the abandonment or discontinuance, publish such findings in the Federal Register as notice to persons intending to offer financial assistance to assure continued rail service under section 1a(6) of the act and pursuant to this section of the regulations. This Federal Register notice will be published when the proceeding is administratively final.

(b) *Submission of offers of financial assistance*

(1) A prospective offeror shall serve any offer of assistance upon the Commission, the carrier owning or operating the involved line, and other parties to an abandonment or discontinuance proceeding.

(i) Such offer may be filed and served at any time subsequent to the filing with the Commission of an abandonment or discontinuance application.

(ii) Such offer must be filed and served no later than 15 days after publication in the Federal Register (as required in paragraph (a) of this section) of a Commission finding that the present and future public convenience and necessity permit or require the proposed abandonment or discontinuance of service.

(2) The offer as filed shall contain:

(i) An offer of financial assistance accompanied by a Proposed Subsidy Payment in the form prescribed in section 1121.45 or an offer to acquire all or a portion of the line accompanied by a detailed statement of the proposed acquisition cost and a proposal for continued operations;

(ii) A resolution, authorization, or other evidence demonstrating that the offeror has, or within a reasonable time will have, the authority to execute and fulfill an agreement to subsidize or to acquire and operate the line;

(iii) Information demonstrating that the offeror has, or within a reasonable time will have, the financial resources to subsidize or acquire the line and to otherwise fulfill its contractual obligations; and;

(iv) Information demonstrating that the financial assistance offered is likely to cover the difference between the revenues attributable and avoidable costs, plus a reasonable return on the value of the line, or the cost of acquisition and continued operation of the line.

(3) If the offeror is not a Government entity it shall also submit:

(i) A current, detailed balance sheet showing its financial condition as to the latest date available (not more than 90 days prior to the filing of the offer); and

(ii) A statement of revenues, expenses, and net income for the current portion of the calendar or offeror's fiscal year and statements for the 2 immediately preceding calendar or fiscal years or if not available, a statement from a bank or other financial institution attesting to the person's financial capability to discharge its obligations; and

(iii) Such additional information which, in the opinion of the offeror, is necessary or appropriate to support a finding that it is financially responsible.

(c) *Proposed subsidy payment*

(1) An offeror of financial assistance for all, or a portion, of a line may formulate an offer of subsidy predicated upon the owning or operating carrier's base year net avoidable costs and reasonable rate of return or upon that carrier's projected subsidy year Estimated Subsidy Payment, as submitted in its abandonment or discontinuance application under section 1121.32(d) of this subpart.

(2) Alternatively, an offeror may compute its own Proposed Subsidy Payment using the methodology and form described in subpart D, the traffic, revenue, and other data contained in the abandonment or discontinuance application, and other evidence of record in the abandonment or discontinuance proceeding.

(d) *Proposed acquisition cost*

(1) An offeror of financial assistance may also make an offer to acquire all or a portion of the line to be abandoned.

(2) In formulating its acquisition offer an offeror may either accept the carrier's valuation of the properties, as submitted in its abandonment application under section 1121.32(d) of this subpart, or may have the properties appraised by a qualified and certified appraiser and may use either the valuation or the appraisal as its acquisition offer.

(3) An acquisition offer shall include a detailed statement of all items making up the offer, including a price certain and all terms and conditions.

(4) An acquisition offer shall include a detailed statement of the manner in which operations will be continued over the line after acquisition by the offeror, including, if applicable, a proposed operating agreement whereby the owning or operating carrier or another carrier will perform the operations.

(e) Upon receipt by the carrier of a written comment under section 1121.36 of this subpart indicating an intent to offer financial assistance or upon receipt by the carrier of an actual offer of financial assistance, whichever occurs earlier, the carrier shall make available to the commenting party or offeror the records, accounts, appraisals, working papers, and other documents used in preparing exhibit I (section 1121.45). Such documents shall be made available during regular business hours at a time and place mutually agreeable to the parties.

(f) *Commission's 30-day determination under section 1a(6) of the act*

(1) If within 30 days of publication in the Federal Register of its finding that the abandonment or discontinuance should be permitted, as provided in section 1121.38(a) of this subpart, the Commission finds, consistent with section 1a(7) of the act, that a financially responsible person has offered financial assistance which is likely to cover—

(i) The difference between the revenues attributable to the line and the avoidable cost of providing rail freight service on the line plus a reasonable return on the value of the line; or

(ii) The acquisition cost of all of any portion of the line, then the Commission shall postpone the issuance of a certificate for such reasonable time, not to exceed 6 months, as is necessary to enable the carrier and the offeror to negotiate and execute a binding agreement to provide a subsidy or to purchase and continue operations over the line. During the negotiation period, or in any event no longer than 6 months, the carrier shall continue to provide service at its own expense.

(2) If within 30 days of publication in the Federal Register of its finding that the abandonment or discontinuance should be permitted, as provided in section 1121.38(a):

(i) No offer of financial assistance has been filed; and

(ii) The Commission is unable to find that a financially responsible person has offered financial assistance which is likely to satisfy the criteria of section 1a(6) of the act, as set forth immediately above in section 1121.38(f)(1)(i) and (ii).

the Commission shall issue a final certificate which shall become effective in accordance with the provisions of section 1a of the act and these regulations.

(g) *Modified estimated subsidy program.*—Offerors may request, and carriers shall provide, an estimated subsidy payment reflecting operations of less than the entire line.

(h) *Negotiations.*

(1) The carrier and the offeror are encouraged to negotiate an agreement for subsidy or acquisition before the issuance by the Commission of a final decision in an abandonment or discontinuance proceeding. The parties may agree to a final Estimated Subsidy Payment or acquisition price which varies from that contained in

the application or in the offer, taking into account such factors as rate increases, changes in traffic level, and maintenance necessary to comply with minimum Federal Railroad Administration Class I safety standards, as projected for the subsidy year. The parties may also agree, in arm's-length negotiations, to provisions which modify the standards established under subpart D of this part.

(2) When an agreement is reached, the parties shall promptly serve a verified copy on the Commission and on all parties to the abandonment or discontinuance proceedings.

(3) The Commission shall not consider an offer of financial assistance or any resulting agreement in making its initial finding on the merits of abandonment or discontinuance application.

(4) The carrier and the offeror are encouraged to keep the Commission informed of the progress of negotiations by the filing of periodic progress reports.

(i) *Commission's action after the 6-month negotiation period*

(1) Upon notification of the execution and receipt of a copy of a financial assistance agreement, the Commission shall postpone the issuance of a final and effective certificate of such period of time as the financial assistance agreement (including any modifications or extensions) is in effect.

(2) If during the 6-month negotiation period the parties are unable to execute a financial assistance agreement, the Commission may

(i) Issue a final certificate at the end of the 6-month period which shall become effective and may be conditioned in accordance with the provisions of section 1a of the act and these regulations;

(ii) Reopen the underlying abandonment or discontinuance proceeding to reevaluate the application on its merits in light of the financial assistance offer;

(iii) Direct the carrier to continue to provide rail freight service for an additional year in return for compensation to be computed by the Commission from its earlier determination under section 1a(7) of the act, as modified to reflect current circumstances, and in accordance with the standards established in subpart D of these regulations; or

(iv) Take whatever action is appropriate to the particular situation and in conformity with section 1a of the act. Such action may include but not be limited to setting the matter for arbitration subject to the final review of the Commission.

(j) *Application to acquire the line*

(1) If a binding financial assistance agreement is executed which provides for the acquisition and continued operation of a line, an application to acquire the line shall immediately be filed under section 1(18) or section 5(2) of the act, whichever is appropriate.

(2) Upon approval of the acquisition application and in conjunction therewith, a final and effective abandonment certificate shall be issued.

(k) *Default on agreement.*—In the event any party to a financial assistance agreement defaults on the obligations thereunder, then any party to the agreement shall promptly inform the Commission. Upon notification the Commission will take such action as it may deem appropriate.

(l) *Reservation of jurisdiction.*—The Commission reserves the right to reopen upon its own motion or on petition, an abandonment or discontinuance proceeding to consider, among other things, any change in circumstance resulting from a financial assistance proposal which may reflect upon the merits of the abandonment or discontinuance application.

Section 1121.39—Public use procedures

(a) When the Commission finds that the present or future public conevenience and necessity permit or require the abandonment of a rail line, it may also make a finding that the rail properties are suitable for use for other public purposes. Such a finding shall be based upon representations of the parties and upon the Commission's own analysis of the record.

(b) When the Commission finds that the rail properties are suitable for use for other public purposes, the Commission shall condition any certificate issued to require that the properties be offered, upon reasonable terms, for acquisition for other public purposes.

(c) To assure compliance with such a condition, the Commission may postpone the effective date of a certificate for period not to exceed 180 days to allow negotiations for acquisition of the properties for other public purposes.

(d) Such a postponement of the effective date of a certificate may run concurrently with any similar postponements required under section 1a(4) of the act or ordered to allow negotiation and execution of a financial assistance agreement under section 1a(6) of the act and section 1121.38 of this subpart.

(e) When an agreement for acquisition of the properties for other public purposes is reached, the parties shall promptly serve a copy on the Commission and all other parties to the proceeding.

(f) When such an executed agreement is filed with the Commission, a certificate of abandonment shall be issued, which shall become effective and may be further conditioned in accordance with the provisions of section 1a of the act and these regulations.

SUBPART D—STANDARDS FOR DETERMINING COSTS, REVENUES, AND RETURN ON VALUE

Section 1121.40—General

(a) Contents of subpart.

(1) Section 1a(7) and section 1a(11)(b) of the act direct the Commission to determine the extent to which the avoidable costs of providing rail service plus a reasonable return on the value of the line exceed the revenues attributable to the line. Section 205(e)(1)(B) of the Regional Rail Reorganization Act of 1973, as amended, directs the office to publish standards for determining the "avoidable costs of providing rail freight service," as that phrase is used in section 1a(6)(a)(ii)(A) of the act. This subpart contains the methodology for such determinations and the standards necessary for application for those terms in the context of a particular proceeding. Such data will be used in reaching the Commission's findings on the merits of an abandonment or discontinuance proceeding and in making the necessary financial assistance determinations.

(2) This subpart also sets forth a method by which the carrier may establish its Estimated Subsidy Payment to be included in its application (section 1121.32(d) of subpart C) and by which an offeror of financial assistance may formulate a subsidy offer and/or Proposed Subsidy Payment under section 1a(6)(a)(i) of the act and section 1121.38 of subpart C.

(b) *Data collection.*—The owning or operating carrier shall establish a system to collect at branch level the data necessary to compute the base year data and the final subsidy payment. The collection and compilation of such data shall be in accordance with the Branch Line Accounting System (49 CFR 1201) established by the Office pursuant to section 205(e)(1)(a) of the Regional Rail Reorganization Act of 1973, as amended.

(c) *Final payment of financial assistance*

(1) When a financial assistance agreement is concluded and rail service continued thereunder, the final annual payment will be adjusted to reflect the actual revenues derived, avoidable costs incurred, and value of the properties used in the subsidy year.

(2) Where an adjustment results in an increase in the Estimated Subsidy Payment upon which the financial assistance agreement is based, the amount of such increase in excess of 15 percent of the estimated payment shall be treated as a carryover avoidable cost in the subsequent subsidy year. However, if the railroad notifies the subsidizer that the estimate will be exceeded by more than 15 percent in one of the Financial Status Reports (section 1121.46) issued during the first 10 months of the subsidy year or the increase results from an expense preapproved by the subsidizer, the adjusted amount shall be included in the final annual payment.

Section 1121.41—Revenues attributable to the rail properties.

The revenues attributable to the rail properties of a branch are the total of the revenues assigned to the branch in accordance with this section, plus any existing subsidy payments that would cease upon discontinuance of service on the branch for the subsidy year. The revenues assigned shall be derived from the following accounts:

(a) *Account 101—Freight.*—The revenues assigned under this account shall be the actual revenues, including transit revenues, accruing to the railroad, derived from waybills and other source documents for all traffic that:

(1) Originates and terminates on the branch;

(2) Originates or terminates on the branch and is handled off the branch on the system but not on another carrier; and

(3) Originates or terminates on the branch and is handled on another carrier.

All traffic that is received or forwarded through interchange at a point on the branch, including ferry operations, shall be considered as originating or terminating traffic to the branch. The revenues of all other bridge or overhead traffic shall be attributed to the branch on ratio of miles moved on the branch to miles moved on the system; provided, however, that the parties may agree on a mutually acceptable usage charge for bridge traffic in lieu of the mileage apportionment.

(b) *Account 106—mail; account 107—express.* The revenues assigned under these accounts shall be apportioned to the branch on the ratio of the miles that the shipment moved on the branch to the miles it moved on the system of the railroad but only if such revenues are earned by freight trains operating on the branch line.

(c) *Account 110—switching; account 113—water transfers; account 132—hotel and restaurant; account 133—station, train, and boat privileges; account 135—demurrage; account 138—communication; account 139—grain elevator; account 141—power; account 142—rents of buildings and other property; account 143—miscellaneous; account 151—joint facility-Cr.; account 152—joint facility-Dr.; account 510—miscellaneous rent income; account 511—income from nonoperating property; and account 519—miscellaneous income.* The revenues assigned under these accounts shall be the actual revenues accruing to the railroad that are directly attributable to the branch.

Section 1121.42—avoidable costs of providing service.

The avoidable costs of providing service on a branch are the total costs assigned or apportioned to the branch in accordance with this section that would not be incurred if service were discontinued. Labor costs must be identified separately for all accounts when costs are directly assigned.

(a) *Maintenance of way and structures.*

(1) *Account 202—roadway maintenance; account 212—ties; account 214—rails; account 216—other track material; account 218—ballast; and account 220—track laying and surfacing.* The costs assigned under these accounts shall be the actual branch costs assigned on a direct basis.

(2) *Account 206—Tunnels and subways; account 208—Bridges, trestles and culverts; account 210—elevated structures; account 221—fences, snowsheds and signs; account 227—station and office buildings; account 229—roadway buildings; account 231—water stations; account 233—fuel stations; account 235—shops and engine houses; account 237—grain elevators; account 239—storage warehouses; account 241—wharves and docks; account 243—coal and ore wharves; account 244—TOFC and COFC terminals; account 247—communications systems; account 249—signals and interlockers; account 253—power plants; account 257—power—transmission systems; account 265—miscellaneous structures; and account 266—depreciation.* The costs assigned under these accounts shall be the actual branch costs assigned on a direct basis. A cost may not be assigned under one of these accounts unless the facility to which it pertains is in use for rail transportation purposes and its only useful purpose is to serve the branch.

(3) *Account 201—superintendence; account 272—removing snow, ice and sand; account 273—public improvements—maintenance; account 274—injuries to persons; account 275—insurance; account 276—stationery and printing; account 278—maintaining joint tracks, yards, and other facilities-Dr.; account 279—maintaining joint tracks, yards, and other facilities-Cr.; account 281—right-of-way expenses; and account 282—other expenses.* The costs assigned under these accounts shall be the actual branch costs assigned on a direct basis.

(4) *Account 269—Roadway machines and account 271—small tools and supplies.*—The costs under these accounts shall be assigned to the branch on the ratio of the branch amounts in accounts 202-221 to the carrier's system total in these accounts.

(b) Rehabilitation costs shall not be included unless: (A) the track involved does not meet minimum Federal Railroad Administration (FRA) Class I safety standards (49 CFR 213), in which case the railroad will furnish a detailed estimate of the costs to rehabilitate the track to the minimum level with the abandonment application and provision to cover such costs shall be included in the subsidy agreement; or (B) the potential subsidizer requests a level of service which requires expenditures for rehabilitation.

(c) *Maintenance of equipment.*

(1) *Account 311—Locomotives—repairs.*—This account shall be separated between yard and other (road) with a further separation between diesel and other (electric). The costs assigned under this account for yard locomotives shall be apportioned to the branch separately for diesel and electric locomotives on the basis of the ratio of branch diesel and electric yard locomotive unit-hours to the total system diesel and electric yard locomotive unit-hours. The costs assigned under this account for other

locomotives (road) shall be apportioned to the branch separately for diesel and electric locomotives on the basis of the ratio of branch diesel and electric locomotive gross ton-miles in road service to the total system diesel and electric locomotive gross ton-miles in road service. The costs assigned under this account for specialized equipment devoted exclusively to branch line service shall be the actual costs assigned on a direct basis.

(2) *Account 318—highway revenue equipment-repairs.*—The costs assigned under this account shall be the actual branch costs assigned on a direct basis.

(3) *Account 323—floating equipment-repairs; account 326—work equipment-repairs; account 328—miscellaneous equipment-repairs; account 329—dismantling retired equipment; and account 330—retirements-equipment.*—The costs assigned under these accounts shall be the actual costs that are directly attributable to the branch.

(4) *Account 331-Equipment-depreciation.*

(i) *Account 331 (52) Locomotives—yard.*—This account shall be included if the branch is serviced by a yard locomotive. The cost shall be assigned to the branch on the basis of the ratio of locomotive unit-hours on the branch to total locomotive unit-hours on the system. The costs assigned under this account for specialized equipment devoted exclusively to branch line service shall be the actual costs assigned on a direct basis.

(ii) *Account 331 (52) Locomotives—other.*—When a branch is served by a local/way or through train crew the expense shall be assigned to the branch on the basis of the ratio of locomotive unit hours on the branch to the total locomotive unit-hours on the system. The costs assigned under this account for specialized equipment devoted exclusively to branch line service shall be the actual costs assigned on a direct basis.

(iii) *Account 331 (53) Freight train cars.*—On-branch car costs shall be calculated on the basis of system average day mileage ratios. This is an element in the cost per car-day and per car-mile calculation.

(iv) *Account 331 (55) Highway revenue equipment.*—The costs assigned under this account shall be apportioned on the ratio of the actual time spent serving the branch to the total time spent serving the carrier. The inclusion of the expense shall be on an actual basis only.

(v) *Account 331 (56) Floating equipment.*—Expenses relating to equipment under this category for which there would be no further need may be included on an actual basis only.

(5) *Account 301—Superintendence; account 302—shop machinery; account 304—power plant machinery; account 305—shop and power plant machinery; account 332—injuries to persons; account 333—insurance; account 334—stationery and printing; account 336—joint maintenance of equipment expenses-Dr.; account 337—Joint maintenance of equipment expense-Cr.; and account 339—Other expenses.* The costs assigned under these accounts shall be the actual costs that are directly attributable to the branch.

(6) *Return on investment—locomotives.*—The return on locomotives shall be calculated in accordance with procedure as follows:

(i) The gross investment in locomotives shall be the total investment in all locomotives whether owned or leased [R-1, Sch. 211 N-2, line 38, cols. (b) + (c) + (d) + (e)].

(ii) The total accrued depreciation and amortization is calculated by adding the accrued depreciation on owned equipment [R-1, Sch. 211 D, line 30, col. (g)];

equipment leased from others [R-1, Sch. 211 E, line 29, col. (g)]; equipment leased to others [R-1, Sch. 211 E, line 29, col. (g)]; plus the amortization reserve [R-1, Sch. 211 G, line 22, col. (j)].

(iii) The net investment in locomotives is calculated by subtracting the total accrued depreciation and amortization in step (ii) above from the gross investment in step (i).

(iv) The current cost of capital used in the calculation on return on investment for locomotives shall be the rate of interest which applied to the latest equipment trust certificates, conditional sales agreements, or equipment lease agreements entered into by the railroad for the purchase or lease of new locomotives.

(v) The return on investment for all locomotives is calculated by multiplying the net investment in step (iii) above by the current costs of capital as determined in step (iv).

(vi) The return on investment shall be apportioned to road freight or yard locomotives in the proportion that depreciation for the classification of locomotives is to the total depreciation for all locomotives. This is calculated as follows: The depreciation apportioned to road freight locomotives [R-1, Sch. 330, line 2, col. (e)] or for yard locomotives [R-1, Sch. 330, line 1, col. (e)] divided by the depreciation for all locomotives [R-1, Sch. 330, line 1, cols. (e) + (h)] plus [R-1, Sch. 330, line 2, cols. (e) + (h)] equals the road freight or yard percentage serving the branch. The percentage derived for road or yard locomotives times the total return calculated in step (v) shall be the portion of the return on investment in locomotives applicable to the branch.

The return on investment shall be assigned to the branch on the basis of the ratio of locomotive unit-hours on the branch to total locomotive unit-hours on the system for the applicable classification of locomotive.

(d) *Traffic—Account 351—Superintendence; account 352—Outside agencies; account 353—Advertising; account 354—Traffic associations; account 355—Fast freight lines; account 356—Industrial and immigration bureaus; account 357—Insurance; account 358—Stationery and printing; and account 360—Other expenses.*—The costs assigned under these accounts shall be the actual branch costs assigned on a direct basis and will be assignable only if it can be demonstrated that such costs would be avoided as a result of the service being discontinued.

(e) *Transportation—Rail line.*

(1) *Account 371—Superintendence; account 372—Dispatching trains; account 373—Station employees; account 374—Weighing, inspection, and demurrage bureaus; account 375—Coal and ore wharves; account 377—Yardmasters and yard clerks; account 379—Yard switch and signal tenders; and account 407—Communication system operation.*—The costs assigned under these accounts shall be the actual branch costs assigned on a direct basis and will be assignable only if it can be demonstrated that such costs would be avoided as a result of the service being discontinued.

(2) *Account 376—Station supplies and expenses and account 389—Yard supplies and expenses.*—The costs assigned under these accounts shall be the actual branch costs assigned on a direct basis.

(3) *Account 378—Yard conductors and brakemen and account 380—Yard enginemen.*—These costs shall be assigned only on a direct basis.

(4) *Account 382—Yard switching fuel.*—The costs assigned to this account shall be the amount in the railroad's account apportioned to the branch on the basis of the ratio of yard diesel locomotive unit-hours on the branch to the railroad's total yard diesel locomotive unit-hours.

(5) *Account 383—Yard switching power produced and account 384—Yard switching power purchased.*—The costs assigned to these accounts shall be the amount in the railroad's accounts apportioned to the branch on the basis of the ratio of electric yard locomotive unit-hours on the branch to the railroad's total electric yard locomotive unit-hours.

(6) *Account 388—Servicing yard locomotives.*—The costs assigned to this account shall be the amount in the railroad's account apportioned to the branch on the basis of the ratio of branch yard locomotive unit-hours to the railroad's total yard locomotive unit-hours.

(7) *Account 392—Train enginemen and account 401—Trainmen.*—These costs shall be the actual branch costs assigned on a direct basis.

(8) *Account 394—Train fuel.*—If the branch is served by a local/way or through traincrew, the costs asigned under this account shall be the amount in the railroad's account apportioned to the branch on the basis of the ratio of branch diesel locomotive unit-hours (road) to the railroad's total diesel locomotive unit-hours (road).

(9) *Account 395—Train power produced and account 396—Train power purchased.*—The costs assigned to these accounts shall be the amounts in the railroad's accounts apportioned to the branch on the basis of the ratio of branch electric road locomotive unit-hours to the railroad's total system electric road locomotive unit-hours.

(10) *Account 400—Servicing train locomotives.*—If the branch is served by a local/way or through train crew, the costs assigned under this account shall be the amount in the railroad's account apportioned to the branch on the basis of the ratio of branch locomotive unit-miles (road) to the railroad's total locomotive unit-miles (road), it did not subscribe to the avoidability theory of compensation adopted by Congress. The railroad is entitled to recover actual traffic cost directly attributable to the branch. It is not entitled to allocate common traffic costs which it would continue to incur if service on the branch were to terminate.

Other matters.—Based on the suggestions of the parties and the experience derived from operation of branch lines under subsidy in the midwest and northeast region, the national standards have been revised in the following respects to cover more completely the avoidable cost of continuing service:

a. *Running overhead from yard to branch; deadheading; taxi and hotel costs.*—These categories of costs arise because of the location of, or the nature of the service required over the branch line. For example, it may be necessary for an engine crew and locomotive to run overhead from a yard, performing no work along the way, to reach a branch line which is the only duty assignment of the crew outside the yard. In these circumstances, the on-branch costs for crew, locomotive and car costs per-mile should reflect the overhead time and mileage. The off-branch costs per car-mile must, however, be adjusted to exclude the overhead mileage. Deadheading, taxi, and hotel costs ordinarily would be included in wage accounts. The standards have been revised to require these costs to be maintained separately from wages to facilitate auditing.

(f) *General—account 451—Salaries and expenses of general officers; account 452—Salaries and expenses of clerks and attendants; account 453—General office supplies and expenses; account 454—Law expenses; account 455—Insurance; account 457—Pensions; account 458—Stationery and printing; account 460—Other expenses; account 461—General joint facilities-Dr.; and account 462—General joint facilities-Cr.*—The costs assigned under these accounts shall be the actual branch costs assigned on a direct basis.

(g) *Miscellaneous operations—account 441—Dining and buffet service; account 442—Hotels and restaurants; account 443—Grain elevators; account 445—Producing power sold; account 446—Other miscellaneous operations; account 447—Operating joint miscellaneous facilities-Dr.; and account 448—Operating joint miscellaneous faiclities-Cr.*—The costs assigned under these accounts shall be the actual branch costs assigned on a direct basis.

(h) *Fringe benefits.*

(1) Fringe benefits shall be assigned on a basis of a percentage of direct wages. The percentage shall be developed by using data from the railroad's latest Form R-1. The total of all health and welfare accounts (Accounts 277, 335, 359, 409, 449, and 456) taken from Sch. 320, col. (b) shall be added to the total of payroll taxes, old-age retirement and unemployment insurance taken from Sch. 350, col. (b). The resulting percentage shall be applied to the direct labor costs relating to maintenance of way and structures, traffic transportation, miscellaneous, and general expenses.

(2) Since direct labor costs are not available for maintenance of equipment, the carrier shall be required to furnish a ratio of labor costs to total maintenance of equipment expenses. The ratio shall be applied to the maintenace of equipment costs assigned to the branch to develop an estimate of the related labor costs. The percentage developed in the preceding paragraph shall then be applied to the estimated labor costs to develop the fringe benefit costs for maintenance of equipment.

(i) *Taxes.*

(1) The amount of revenue taxes shall be computed based on the amounts directly paid in those States that subject the carrier to a revenue tax.

(2) The amount of property taxes shall be the amount levied against the property on the branch, in those States where a true ad valorem tax is levied, based on the value of certain kinds of railroad property such as track, land buildings, and other facilities. In States where property taxes are levied on the basis of a formula of a statewide valuation of property, the carrier shall support any claim of savings for property taxes in the event of abandonment of the branch. If the carrier would realize statewide savings on the basis of a proposed discontinuance of service on more than one branch operated in that State, the amount assigned to that branch shall be apportioned on the basis of the ratio of the miles of track on that branch to the carrier's miles of track proposed for discontinaunce in that State.

(j) *Rent income.*

(1) *Account 503—Hire of freight cars and highway revenue equipment-credit balance.*—The amount assigned under this account shall be based on a special analysis of the highway revenue equipment used exclusively on the branch.

(2) *Account 504—Rent from locomotives; account 506—Rent from floating equipment; account 507—Rent from work equipment; and account 509—Income from lease of road and equipment.*—The amounts assigned under these accounts shall be based on the actual receipts for the kind of equipment rented, but may not be included unless the kind of equipment rented is normally used exclusively for branch traffic.

(3) *Account 508—Joint facility rent income.*—The amounts assigned under this account shall be the actual branch receipts assigned on a direct basis.

(k) *Rents costs.*

(1) *Account 536—Hire of freight cars and highway revenue freight equipment-Debit balance.*—The amount assigned under this account shall be based on a special analysis of the highway revenue equipment used exclusively on the branch.

(2) *Account 537—Rent for locomotives; account 539—Rent for floating equipment; and account 542—Rent for leased roads and equipment.*—If the equipment is used exclusively for branch traffic, the costs assigned under these accounts shall be the actual branch costs assigned on a direct basis. If analysis shows common rents, the common rents cost shall be apportioned to the branch on the basis of the ratio of applicable locomotive, passenger-train car, or floating equipment days or miles, as used for billing purposes, on the branch to the total of those days or miles on other lines of the railroad.

(3) *Account 540—Rent for work equipment.*—The costs assigned under this account shall be the actual branch costs assigned on a direct basis.

(4) *Account 541—Joint facility rents.*—The costs assigned under this account shall be the actual branch costs assigned on a direct basis, plus, for common expenses, an apportionment of common expenses to the branch on the basis of the ratio of the branch total in accounts 278, 336, 390, and 412 to the railroad's total in those accounts.

(l) *Freight train car costs.*—The on-branch costs for time-mileage freight-train cars shall be calculated on the basis of the railroad's average costs per day and per mile. These costs shall include *account 314—Freight train cars—Repairs; account 331 (53) Equipment-Depreciation of freight train cars; freight car portion of account 503—Hire of freight cars and highway revenue equipment-Credit balance; freight car portion of account 536—Hire of freight cars and highway revenue equipment-Debit balance; and the return on investment in freight-train cars.* The system totals for repairs and depreciation shall be divided into time related costs and mileage related costs on the basis of the standard Rail Form A apportionment factors (i.e., 50 percent time and 50 percent mileage for repairs, and 60 percent time and 40 percent mileage for depreciation). Return on investment shall be treated as a 100-percent time related cost. The system total receipts and payments for the hire of time-mileage cars and the basic data used in the development of the car-day and car-mile factors shall be taken from the railroad's latest Form R-1. The specific steps to complete the calculations are as follows:

(1) The total system car-days shall be calculated by averaging the railroad's freight car ownership at the beginning and ending of the year (R-1, Sch. 417, line 69, cols. n and w); multiplying the average by the standard active number of car-days per car (346) as developed in ICC docket number 31358; subtracting car-days on foreign lines (R-1, Sch. 376, lines 17 and 18, col. (c)); and adding the foreign **car-days** on home line (R-1, Sch. 376, lines 17 and 18, col. (d)).

(2) The total railroad car miles shall be calculated by adding the loaded car miles [R-1, Sch. 531, line 12, col. (b)] to the empty car miles (R-1, Sch. 531, line 14, col. (b)).

(3) The cost per car-day shall be calculated by adding 50 percent of the railroad's total freight-train car repair cost (R-1, Sch. 320, line 74, col. (e)); 60 percent of the railroad's total freight-train car depreciation costs [R-1, Sch. 330, line 3, col. (e)]; 100 percent of the railroad's return on investment on freight-train cars (which shall be the interest rate which applied to the latest equipment trust certificates, conditional sales

agreement or lease entered into by the railroad necessary for the purchase or lease of freight cars times the amount from Rail Form A, Form 2, line 20, col. 3); the time portion of the railroad's payments for the line of time-mileage freight-train cars (R-1, Sch. 376, line 14, col. (d)) plus 50 percent of Leased Rental-Railroad, Insurance and Other Companies (R-1, Sch. 376, line 15, cols. (d) and (f)), Other Basis (R-1, Sch. 376, line 16, cols. (d) and (f)), and Auto Racks (R-1, Sch. 376, line 21, cols. (d) and (f)); subtracting the time portion of the railroad's receipts for hire of time-mileage freight-train cars (R-1, Sch. 376, line 14, col. (c)), and 50 percent of Leased Rental—Railroad, Insurance and Other Companies (R-1, Sch. 376, line 15, cols. (c) and (e)); Other Basis (R-1, Sch. 376, line 16, cols. (c) and (e)), and Auto Racks (R-1, Sch. 376, line 21, cols. (c) and (e)); and dividing the result by the total system car-days developed in paragraph (1).

(4) The cost per car-mile shall be calculated by adding 50 percent of the railroad's total freight-train car repair cost (R-1, Sch. 320, line 74, col. (e)); 40 percent of the railroad's total freight-train car depreciation costs (R-1, Sch. 330, line 3, col. (e)); the mileage portion of the railroad's payments for hire of time-mileage freight-train cars (R-1, Sch. 376, line 8, col. (d)) plus 50 percent of Leased Rental—Railroad, Insurance and other Companies (R-1, Sch. 376, line 15, cols. (d) and (f)), Other Basis (R-1, Sch. 376, line 16, cols. (d) and (f)), and Auto Racks (R-1, Sch. 376, line 21, cols. (d) and (f)); subtracting the mileage portion of the railroad's receipts for the hire of time-mileage freight-train cars (R-1, Sch. 376, line 8, col. (c)), and 50 percent of the following lines: Leased Rental—Railroad Insurance and Other Companies (R-1, Sch. 376, line 15, cols. (c) and (e)), Other Basis (R-1, Sch. 376, line 16, cols. (c) and (e)), and Auto Racks (R-1, Sch. 376, line 21, cols. (c) and (e)); and dividing the result by the total system car-miles developed in paragraph (2).

(5) The costs per car-day and per car-mile developed in paragraphs (3) and (4) of this section shall be applied to the total car days and total car-miles accumulated on the branch for all traffic originated and/or terminated on the branch and all bridge traffic handled by the branch during the subsidy period which are attributable to time-mileage freight-train cars. The car-day and car-mile factors shall be furnished by the railroads. The on-branch costs for freight-train cars rented on a straight mileage basis shall be the system average cost per car-mile applied to the total car-miles accumulated on the branch, loaded and empty. The average cost per car-mile is developed from the railroad's latest Form R-1, Sch. 376, as follows: col. (d) plus col. (f) divided by col. (b), (using line 1 for tank cars, line 2 for refrigerator cars, line 5 for TOFC/COFC cars and line 3 for all other cars).

(m) *Off-branch costs.*

(1) Certain terminal costs, line-haul car costs, and interchange costs shall be considered as the off-branch avoidable costs of providing service over the remainder of the railroad's system. These costs shall be computed by applying variable unit costs to the service units attributed to the branch traffic during the subsidy period.

(2) The following through train single line variable unit costs shall be developed by Class I railroads by applying Rail Form A to data contained in its latest Form R-1 filed with the Commission:

(i) Normal Rail Form A carload terminal cost per carload by car type.

(ii) Modified Rail Form A, carload terminal cost per carload by car type (i.e., (1) substitute an intertrain switching cost separated between mileage and other than mileage cars, in place of a roadtrain to industry switching cost; (2) substitute modified car ownership costs per car day for two days developed in accordance with Section 1121.42(e), above, for the standard Rail Form A day ownership cost).

READEX FICHE best copy available

(iii) Rail Form A per hundredweight terminal cost.

(iv) Rail Form A cost per car mile by car type.

(v) Rail Form A cost per ton-mile.

(vi) Rail Form A cost per car interchanged, separated between mileage and other than mileage cars.

The costs described above shall be applied by Class I railroads in accordance with the procedure set forth below:

(3) Calculations by car type.

(i) The sum of all terminal costs incurred off of the branch line shall be calculated by multiplying the modified terminal cost per carload in 2(ii) above, by car type, by the total number of carloads originated or terminated on the branch line during the subsidy year. To this amount add the regular terminal cost per carload, by car type, times the number of carloads which originated or terminated on the branch that are local to the railroad serving the branch.

(ii) The sum of the hundredweight terminal costs incurred off the branch line shall be calculated by multiplying the unit cost from 2(iii) above by the number of hundredweight of freight originated or terminated on the branch that are local to the railroad serving the branch.

(iii) The sum of the line-haul car-mile costs incurred off the branch line shall be calculated by multiplying the unit cost in item 2(iv) above, by car type, to the loaded car-miles generated off the branch line by cars originated or terminated on the branch during the subsidy year. Where overhead movements to and from the branch have been included in the on-branch cost calculation under other sections of 1121.42, the related loaded car miles shall be excluded from this calculation.

(iv) The sum of the line-haul hundredweight mile costs shall be determined by multiplying item 2(vi) above by the total ton-miles of revenue-freight incurred by applicant on its lines, other than the branch line, for revenue freight originated or terminated on the branch during the subsidy year.

(v) The interchange cost shall be calculated by multiplying the cost per car interchanged (item 2(vi) above) by the number of carloads of traffic interchanged that originated or terminated on the branch.

(4) Class II line-haul railroads shall calculate off-branch costs as follows:

(i) The estimated system variable expenses are calculated by multiplying the sum of the total operating expenses (Schedule 2002, L. 54, col. (b)), net rents (Schedule 300, L. 21, col. (b) and tax accruals less federal income taxes (Schedule 350, L. 18, col. (b) less L. 13, col. (b)) in the carrier's latest Annual Report (Form R-2) by .78, the three year composite variability ratio for all Class I railroads.

(ii) The cost per ton mile of revenue freight is calculated by dividing the amount developed in step (i) by the system total ton miles of revenue freight (Schedule 2601, L. 25, col. (d)) in the carrier's latest Annual Report (Form R-2).

(iii) The cost developed in step (ii) shall be applied to the total revenue ton miles of traffic attributable to the branch which moves over other portions of the railroad's system.

(n) *Administrative costs.*—The costs assigned under this account shall be the actual costs directly attributable to the administration of the subsidy program or at the option of the carrier, one percent of the total annual revenues attributed to the branch shall be allowable to cover all costs of administering the subsidy program.

(o) *Casualty reserve account.*—The costs assigned under this account shall be any payments mutually agreed to by the person offering the subsidy and the carrier for the purpose of holding the subsidizer harmless from any liability under *account 415—Clearing wrecks; account 416—Damage to property; account 417—Damage to livestock on right-of-way; account 418—Loss and damage-Freight; and account 420—Injuries to persons*. Such cost may include a reasonable fee to cover the cost of administering the fund.

(p) *Overhead movement costs.*—The costs assigned under this account shall be the actual costs incurred in moving overhead in order to provide service to the branch line. The amounts shown shall be limited to transportation (section 1121.42(e)); equipment (section 1121.42(c)(1), (4), (6)); and freight train car (section 1121.42(1)(4)). The amounts shown under this section shall not be included under other sections of these regulations.

Section 1121.43—Valuation of rail properties

The investment base to which the return element shall apply shall be the sum of:

(a) The allowable working capital computed at 15 days on-branch cash avoidable costs (on-branch avoidable costs less depreciation);

(b) The amount of current income tax benefits resulting from abandonment of the line which would have been applicable to the period of the subsidy agreement (this information to be furnished by the railroad and subject to audit by the person offering the subsidy); and

(c) The net liquidation value, for their highest and best use for nonrail purposes, of the rail properties on the line to be subsidized which are used and required for performance of the services requested by the person offering the subsidy. This value shall be determined by computing the current appraised market value of such properties for other than rail transportation purposes, less all costs of dismantling and disposition of improvements necessary to make the remaining properties available for their highest and best use and complying with applicable zoning, land use, and environmental regulations.

Section 1121.44—Reasonable return

(a) A carrier not in reorganization shall furnish to the Commission and to any financially responsible person considering the offer of a rail service continuation payment, a statement, with substantiation, of its current cost of capital, after adjustment for the effects of current Federal and States income taxes.

(b) For a carrier in reorganization, the cost of capital for the purpose of the rail service continuation payment shall be the average yield on all railroad bonds for the week immediately preceding the execution of the subsidy agreement, as quoted by any standard investors' service, adjusted for the effects of Federal or State income taxes (if any), actually incurred by the carrier during the term of the agreement.

(c) The return element of the subsidy payment shall be computed by applying the cost of capital as determined above to the investment base determined pursuant to section 1121.43. The return shall be adjusted annually to reflect the carrier's actual current (cash) effective Federal and State income tax rate. In the event the carrier and the subsidizer cannot agree as to the amount of the return element, this amount will be determined by the Commission, and the Commission's determination shall be final.

Section 1121.45—Submission of revenue and cost data

The following information shall be submitted by applicant as Exhibit 1 to an abandonment or discontinuance application (section 1121.32(d)) and shall be developed in accordance with the methodology established in sections 1121.41-.44, as applicable. Such information, form, and methodology shall also be used by an offeror of financial assistance to formulate a Proposed Subsidy Payment (section 1121.38).

Section 1121.45

Revenues attributable for	*Base year operations*	*Projected subsidy year operations*
1. Freight originated and/or terminated on branch		
2. Bridge traffic		
3. Demurrage		
4. All other		
5. Total revenues attributable (lines 1 through 4)		
Avoidable costs for		
6. Off-Branch costs		
7. On-Branch costs (lines 7a through 7k)		
a. Maintenance of way and structures		
b. Maintenance of equipment		
c. Traffic		
d. Transportation		
e. Miscellaneous general		
f. Miscellaneous operations		
g. Fringe benefits		
h. Taxes		
i. Rent income		
j. Rent costs		
k. Bridge traffic rerouting		
8. Total avoidable costs		
Subsidization costs for		
9. Rehabilitation[1]		
10. Administrative costs (subsidy year only)[2]		
11. Casualty reserve account[2]		
12. Total subsidization costs		
Return on value for		
13. Valuation of property (lines 13a through 13c)		
a. Working capital		
b. Income tax benefits		
c. Net liquidation value		
14. Rate of return		
15. Total return on value (line 13 times line 14)		
16. Avoidable loss from operations (line 5 minus line 8)		
17. Estimated subsidy (line 5 minus lines 8, 12, and 15)-	XXX	————

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[1] Projection shall include amounts necessary to attain FRA Class I safety standard.

[2] Omit in applications pursuant to section 1121.32 and 1121.33.

Section 1121.46—Financial status report

Within 30 days after the end of each quarter of the subsidy year, each carrier which is party to a financial assistance agreement shall submit to the subsidizer a Financial Status Report for each line operated under subsidy. Such Financial Status Report shall be in the form prescribed below. Significant deviations from the negotiated estimates must be explained. Unless the parties agree otherwise, the third quarter report will be the basis for negotiating the financial assistance agreement for the subsequent subsidy year. The year-end report will be the basis of the subsidy payment adjustment. All data shall be developed in accordance with the methodology set forth in sections 1121.41-44. In the quarterly reports, the actual data for the year to date and a projection to the end of the subsidy year shall be shown for each item.

Section 1121.40

Revenues for *Actual projected*

1. Freight originated and/or terminated on branch
2. Bridge traffic
3. Demurrage
4. All other
5. Total revenues (lines 1 through 4)

Avoidable costs for

6. Off-Branch costs
7. On-Branch costs (lines 7a through 7k)
    a. Maintenance of way and structures
    b. Maintenance of equipment
    c. Traffic
    d. Transportation
    e. Miscellaneous general
    f. Miscellaneous operations
    g. Fringe benefits
    h. Taxes
    i. Rent income
    j. Rent costs
    k. Bridge traffic rerouting
8. Total avoidable costs

Subsidization costs for

9. Rehabilitation
10. Administrative cost
11. Casualty
12. Total subsidization costs

Return on value

13. Valuation of property (lines 13a through 13c)
    a. Working capital
    b. Income tax benefits
    c. Net liquidation value

Return on value for—Continued	*Actual projected*
14. Rate of return	
15. Total return on value (line 13 times line 14)	
Subsidy payment	
16. Subsidy payment (line 5 minus lines 8, 12, and 15)	

APPENDIX A

Submission of system diagram maps for publication in the Federal Register shall consist of a cover page on a 8 x 10 1/2 bond paper, and such cover page shall contain the following information:

Cover Page

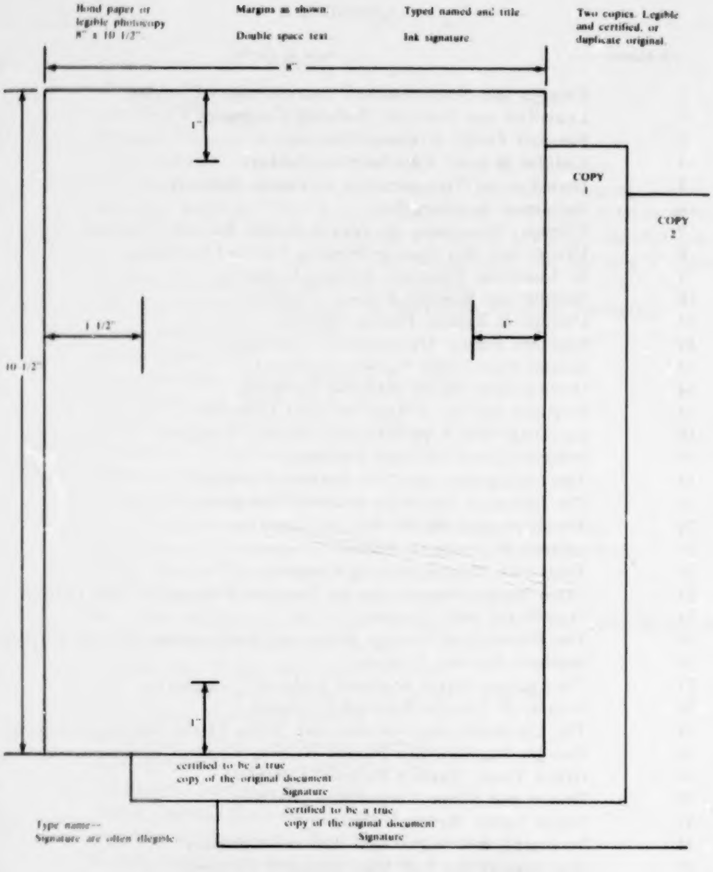
AB——————————(SDM)

NAME OF RAILROAD

The system diagram maps of the——————————, are attached hereto and are submitted for publication in the Federal Register pursuant to the regulations of the Interstate Commerce Commission as set forth in 49 CFR 1121.22.

Signature

Margins for the cover page and maps in as many pages as may be necessary to comply with the regulations herein adopted, 49 CFR 1121.22 shall be in accordance with page 2 of this appendix.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APPENDIX B

AB Number	*Name of Carrier*
1	Chicago and North Western Transportation Company
2	Louisville and Nashville Railroad Company
3	Missouri Pacific Railroad Company
4	Cadillac & Lake City Railway (Debtor)
5	Penn Central Transportation Company (Debtor)
6	Burlington Northern Inc.
7	Chicago, Milwaukee, St. Paul & Pacific Railway Company
8	Denver and Rio Grande Western Railroad Company
9	St. Louis-San Francisco Railway Company
10	Norfolk and Western Railway Company
11	Chicago & Eastern Illinois Railroad
12	Southern Pacific Transportation Company
13	Holton Inter-Urban Railway Company
14	Northwestern Pacific Railroad Company
15	Petaluma and Santa Rosa Railroad Company
16	San Diego and Arizona Eastern Railway Company
17	Visalia Electric Railroad Company
18	The Chesapeake and Ohio Railway Company
19	The Baltimore and Ohio Railroad Company
20	The Texas and Pacific Railway Company
21	Abilene & Southern Railway Company
22	Texas-New Mexico Railway Company
23	Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans
24	Fort Worth Belt Company
25	The Weatherford Mineral Wells and Northwestern Railway Company
26	Southern Railway Company
27	The Alabama Great Southern Railroad Company
28	Central of Georgia Railroad Company
29	The Cincinnati, New Orleans and Texas Pacific Railway Company
30	Georgia Southern and Florida Railway Company
31	Grand Trunk Western Railroad Company
32	Boston and Maine Corporation (Debtor)
33	Union Pacific Railroad Company
34	St. Joseph & Grand Island Railroad Company
35	Los Angeles and Salt Lake Railroad Company
36	Oregon Short Line Railroad Company
37	Oregon-Washington Railroad and Navigation Company
38	Pennsylvania and Atlantic Railroad Company
39	St. Louis Southwestern Railway Company
40	St. Louis Southwestern Railway Company of Texas
41	Flint Hills Railway, Inc.
42	Aroostock Valley Railroad Company
43	Illinois Central Gulf Railroad Company
44	Lehigh Valley Railroad Company (Debtor)
45	Albany Port District Commission
46	Chicago, Rock Island and Pacific Railroad Company
47	Duluth Union Depot and Transfer Company

AB Number	*Name of Carrier*
48	Erie Lackawanna Railway Company
49	The Ann Arbor Railroad Company
50	Reading Company (Debtor)
51	Oregon Electric Railway Company
52	The Atchison, Topeka and Santa Fe Railway Company
53	The Kansas and Missouri Railway and Terminal Company
54	Georgia Railroad; The Western Railway of Alabama; Atlanta & West Point Railroad Company; Milledgeville Railway Company; Georgia Railway and Banking Company
55	Seaboard Coast Line Railroad Company
56	The City of Maryville and The Maryville Housing Authority
57	Soo Line Railroad Company
58	Reader Railroad
59	Chattahooche Valley Railway Company
60	Morehead and North Fork Railroad Company
61	Spokane, Portland & Seattle Railway Company
62	Marinette, Tomahawk & Western Railroad Company
63	Midway Railroad Company
64	Chattanooga Station Company
65	St. Johnsbury and Lamoille County Railroad Company
66	Minneapolis, Anoka and Cuyuna Range Railroad Company
67	West Pittston-Exeter Railroad Company
68	Lake Superior & Ishpeming Railroad Company
69	Western Maryland Railway Company and (The Baltimore and Cumberland Valley Rail Road)
70	Florida East Coast Railway Company
71	The Baltimore and Annapolis Railroad Company
72	Sacramento Northern Railway
73	Cincinnati Union Terminal Company
74	Pennsylvania-Reading Seashore Lines
75	Richmond Terminal Company
76	Texas Central Railroad Company
77	Bangor and Aroostook Railroad Company
78	Fonda, Johnstown and Gloversville Railroad Company
79	Central Railroad Company of New Jersey
80	Allentown Terminal Railroad Company
81	Norwood & St. Lawrence Railroad Company
82	The Marianna and Blountstown Railroad
83	Maine Central Railroad Company
84	Illinois Terminal Railroad Company
85	The Union Terminal Company
86	Cheswick and Marmar Railroad Company
87	Susquehanna Connecting Railroad Company
88	Bessemer and Lake Erie Railroad Company
89	Alameda Belt Line
90	Caton & Loudon Railway Company
91	Central Illinois Light Company
92	The Salt Lake City Union Depot and Railroad Company

AB Number	*Name of Carrier*
93	Peoria Terminal Company
94	El Paso Union Passenger Depot Company
95	Hollis and Eastern Railroad Company
96	Bellefonte Central Railroad Company
97	The Texas Mexican Railway Company
98	Claremont and Concord Railway Company
99	Arkansas Western Railway Company
100	The General State Authority (Commonwealth of Pennsylvania)
101	Duluth, Missabe and Iron Range Railway Company
102	Missouri-Kansas-Texas Railroad Company
103	Kansas City Southern Railway Company
104	East Tennessee and Western North Carolina Railroad Company
105	Western Pacific Railroad Company
106	The Colorado & Wyoming Railway Company
107	Kalamazoo, Allegan and Grand Rapids Railroad Company
108	Texas Export Railroad Company
109	Quanah, Acme and Pacific Railway Company
110	Nezperce Railroad Company
111	Detroit, Toledo and Ironton Railroad Company
112	Great Plains Railway Company
113	Edgemoor and Manetta Railroad
114	Clarendon and Pittsford Railroad Company
115	Lehigh and New England Railway Company
116	City of Hillsboro (for Oregon Electric Railway)
117	Elgin, Joliet and Eastern Railway Company
118	Albany Passenger Terminal Company
119	The Fort Worth and Denver Railway Company
120	Chicago and Western Indiana Railroad Company
121	Spokane International Railroad
122	Terminal Railroad Association of St. Louis
123	Chicago Produce Terminal Company
124	Waterloo Railroad Company
125	Norfolk Southern Railway Company
126	Wellsville, Addison and Galeton Railroad Corporation
127	Central Iowa Transportation Cooperative
128	East Washington Railroad Company
129	Twin Branch Railroad Company
130	Cotton-Plant Fargo Railway Company
131	Yakima Valley Transportation Company

FINANCE DOCKET NO. 28436

WESTERN PACIFIC RAILROAD COMPANY—COMPETITIVE BIDDING EXEMPTION

Decided April 14, 1977

Found that, subject to authorization by the Commission in a subsequent proceeding of the issue and sale by Western Pacific Railroad Company of not exceeding $25 million principal amount of applicants bonds or debentures, the sale by the applicant of such bonds or debentures at competitive bidding should not be required.

Walter G. Treanor and *Katherine M. Griffin,* attorneys for applicant.

REPORT OF THE COMMISSION

THE FINANCE BOARD, MEMBERS
MATTRAS, MCCORMICK, AND PROGER

The Western Pacific Railroad Company by special application filed March 25, 1977, requests exemption pursuant to exception (7), Ex Parte No. 158, *In Re Competitive Bidding in the Sale of Securities,* 257 I.C.C. 129, 164, (49 CFR 1115.25), from the requirements therein stated, with respect to the issue and sale of not exceeding $25 million principal amount of the Western Pacific Railroad Company first and refunding mortgage bonds or other debentures to be issued and sold, and the proceeds therefrom to be used for purposes hereinafter stated. No objections to the special application have been offered.

The special application for exemption from competitive bidding requirements was made preliminary to the filing of an application under section 20a of the Interstate Commerce Act, for authority to issue and sell said bonds or debentures.

The applicant, a common carrier by railroad, was incorporated in the State of California on June 6, 1916, and operates in the States of California, Nevada, and Utah.

The applicant advises that the proceeds from the issuance and sale of the bonds or debentures in the principal amount of $25 million proposed to be issued by the applicant are to (1) refund or retire at maturity $14,275,000 of the applicant's series A bonds issued under its first and refunding mortgage which will become due on January 1, 1981, (2) provide for funding for capital expenditures and reimbursements of capital expenditures, and (3) increase working capital and serve other general corporate purposes of the applicant.

Applicant states that it has had only preliminary discussions of an exploratory nature with underwriters. Accordingly, the proposed securities have been described in general terms only. At the present time it is contemplated that the securities will mature in from 10 to 30 years, depending upon the condition of the market for railroad securities just prior to the time the actual sale of the securities is negotiated, and will provide for payment of interest in semiannual payments at the most favorable rate obtainable by the applicant, subject to sinking fund and optional redemption provisions, and will be issued in fully registered form without coupons, in registered form as to principal with coupons or in bearer form with coupons; and may be secured under applicant's first and refunding mortgage.

Applicant relates that in the aforementioned preliminary discussion its investment advisors pointed out that the public market for railroad bonds is uncertain and that the applicant's obligations would likely receive a medium-grade quality rating from the principal bond rating agencies. Said investment advisors also indicated that there presently appears to be an unusual amount of institutional funds available for private placement. It was the recommendation of said investment advisors and it is contended by the applicant, that the securities would best be sold through a negotiated sale in the private market or possibly the public market.

The applicant maintains that a negotiated sale will probably provide cost and interest savings. In addition it is urged that a negotiated sale will allow for flexibility in fixing the terms of the securities to the specifications of purchasers, and would permit better control of the timing of such sale to adjust to short term changes in market conditions affecting the price and interest rate. In the event the public market should improve, and a negotiated public offering becomes more advantageous, the applicant submits that the principal underwriter is expected to syndicate the strongest group of underwriters thereby enhancing the prospects for a successful sale of said securities at the lowest cost. By contrast, it is claimed, resort to competitive bidding would split the strength of underwriters, increase their individual costs, and lessen the probabilty of any individual underwriter taking the time and expense to sufficiently educate the investment community in the manner necessary to insure sale on the most favorable basis. Notwithstanding that $14,275,000 of the applicant's series A bonds issued under its first and refunding mortgage will not become due until January 1, 1981, applicant urges that the present market may offer an appropriate opportunity to refund or retire the same and that it is desirable to commence its financing preparations.

No discussions or negotiations respecting the terms of the bonds may lawfully be entered into by the applicant prior to its receipt of the requested exemption from competitive bidding, and until such terms are decided upon, the applicant will not be in a position to file its application under 20a of the Interstate Commerce Act. Given the foregoing reasons, the applicant submits that it is in the public interest for it to be granted said exemption.

In our opinion, the circumstances stated entitle the applicant to relief from the requirements of competitive bidding under exception (7) set forth in Ex Parte No. 158, *supra.* To the extent that $14,275,000 of the proceeds of said bonds will be used to refund at maturity certain of applicant's series A bonds which will become due on January 1, 1981, the applicant is entitled to the relief from the requirements of competitive bidding under exemption (2) as set forth in Ex Parte No. 158, *supra.* However, nothing contained herein is to be constructed as authorization by us of the issue of the proposed securities.

We further find that our decision does not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

In view of these conclusions, and providing that the negotiation and sale of the proposed bonds will comply with section 10 of the Clayton Antitrust Act, subject to authorization by the Commission in a subsequent proceeding of the issue by The Western Pacific Railroad Company of not exceeding $25 million principal amount of its bonds or debentures, we find that the sale by it of such securities at competitive bidding should not be required.

No. AB-1 (Sub-No. 45)

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY ABANDONMENT BETWEEN MINERVA JUNCTION AND ROLAND, IN STORY AND MARSHALL COUNTIES, IOWA

Order issued permitting abandonment by applicant of that portion of its branch line of railroad between Zearing and Roland, Iowa, subject to conditions. Issuance of a certificate withheld pending compliance with Public Law 94-210. Application in all other respects denied.

Christopher A. Mills and *Frank W. Davis, Jr.* for applicant.

Allen E. Brennecke, Robert S. Steiner, Kathleen D. Johnson, Gary Ankeny, and *Lambert C. Burkhalter* for protestants.

Decision and Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, (Commissioners *Brown, MacFarland,* and *Clapp*), held at its office in Washington, D.C., on the 5th day of January 1977.

Upon consideration of the application and the record in the above-entitled proceeding, including the initial decision and recommended order of the Administrative Law Judge, the exceptions filed by applicants on August 12, 1976, and reply thereto by Transportation Regulation Board of Iowa Department of Transportation, filed August 30, 1976, the exceptions filed by protestant Transportation Regulation Board of Iowa Department of Transportation filed August 6, 1976, and reply thereto filed by applicant on August 23, 1976; and

It appearing, That the Administrative Law Judge recommended that an order be issued (1) permitting abandonment by applicant of that portion of its branch line of railroad between Zearing and Roland, Iowa, subject to conditions, and (2) denying abandonment by applicant of that portion of its branch line between Minerva Junction and Zearing;

It further appearing, That the pleadings present no new, material, or applicable matters of fact or law not adequately considered and properly disposed of by the Administrative Law Judge in his report, and are not of such nature as to require the issuance of a report discussing the evidence in the light of the pleadings;

Wherefore, and good cause appearing therefor:

We find, That the evidence considered in the light of the pleadings does not warrant a result different from that reached by the Administrative Law Judge, and that the statement of facts, the conclusions, and the findings of the Administrative Law Judge in his report, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own; and

It is ordered, That said application, insofar as it seeks abandonment of applicant's branch line between Zearing and Roland, Iowa, be and it is hereby granted, subject to the conditions set forth in the aforesaid decision, and in all other respects, the application be, and it it is hereby, denied.

The statement of facts, conclusion, and finding of Administrative Law Judge Kenneth A. Jennings, follows:

Chicago and North Western Transportation Company, hereinafter called C&NW or applicant, a common carrier by railroad subject to part I of the Interstate Commerce Act, on January 31, 1975, applied under section 1(18) of the act for a certificate of public convenience and necessity permitting it to abandon a branch line of railroad (hereinafter referred to as the line or Roland line or branch line) extending from milepost 240.0 at Minerva Junction, Marshall County, Iowa, in a westerly direction to the end of that line at milepost 269.6 at Roland, Story County, Iowa, a distance of 29.6 miles in Story and Marshall Counties, Iowa. Protests to the application were filed, and the application was referred to the Administrative Law Judge for hearing and an initial decision thereon. Hearing was held on January 20-22 and April 5, 1976, at Marshalltown, Iowa. The Iowa Transportation Regulation Board, United Transportation Union, and a number of shippers appeared in opposition to the proposed abandonment.

The branch line was constructed in 1881 and acquired by Chicago & North Western Railway Company in 1960 from the Minnespolis & St. Louis Railway Company (M&StL). In 1972, applicant became the successor-in-interest to Chicago & North Western Railway Company, and discussion hereinafter of the branch line refers to operation by those two companies. The line is in poor condition. The rail on the line is mostly 70-pound rail with 3 miles of 80-pound rail. The rail was secondhand when laid over various periods extending back to 1915. There are 115 spans of pile bridges and 76 culverts which are in poor to fair condition. The ties on the line are in poor condition and 41 percent are defective. Ballast on the line is practically nonexistent, and much of the line is in a low area close to the water table, with the result that during periods of wet weather the line is inundated. In 1973 and 1974, there were 35 derailments of trains on the line. On December 27, 1974, C&NW placed an embarbo on the line, i.e. it was taken out of service and operations ceased thereover because they could no longer be safely conducted due to the condition of the line. Prior to that date, maximum speed limit on the line was 10 miles per hour. To make the branch line suitable for resumption of reasonably reliable operations at 10 mph and meet class I track safety standards as prescribed by the Federal Railroad Administration, the C&NW estimates the rehabilitation cost would be $813,935. After such restoration of the line, applicant estimates annual maintenance expenses of $91,125 would be required to continue reliable operations at 10 mph. Estimated rehabilitation costs of $3,753,740 were also submitted to meet class III track standards for operations at 30 mph, but such expenditure is not necessary to afford reasonable service on the line and would not be realistic in view of C&NW's present financial condition, and no further consideration will be given to upgrading the line to class III standards. The branch line has an estimated net salvage value of $339,967. That salvage value includes 367.5 acres of land valued at $165,000 which C&NW would attempt to sell on abandonment.

Generally, the condition of the Roland line is uniformly poor, which is attributable to the C&NW's failure to maintain it. In 1973, applicant spent $1,965 per mile in maintenance of the line and $1,823 per mile in 1974. C&NW's systemwide expense for maintenance-of-way per mile for 1973 and 1974 was $3,286 and $4,730 per mile, respectively. Applicant presented an exhibit reflecting that its maintenance in 1973 more than doubled the maintenance costs on 10 other selected branch lines in Nebraska, Minnesota, and Iowa which predominately handle grain. C&NW states that it expends its maintenance funds for the most part on its high-speed, high-traffic density lines for frequent train operation, and the small remaining funds are used to maintain low-traffic density branch lines, in which category it places the Roland line.

After the C&NW embargoed the branch line, this Commission brought suit against it to enjoin such alleged wrongful abandonment. The court found that the C&NW had abandoned the line in violation of section 1(18) of the act but because of the pendency of the instant proceeding and a balancing of equities in light thereof, the court denied the Commission's request for injunctive relief, *Interstate Com. Com'n.* v. *Chicago & N.W. Transp.* (U.S. Dist. Ct. S.D. Iowa C.D.) 407 F. Supp. 827 (1975). That decision was affirmed in Nos. 75-1778 and 75-1824, *Interstate Commerce Commission* v. *Chicago and North Western Transportation Company and Larry S. Provo*, on March 29, 1976, by the U.S. Court of Appeals, Eighth Circuit. The United States Supreme Court has now granted the parties an extension of time for the filing of petitions for *cetiorari* in such proceeding.

Until the Roland line was taken out of service in December 1974, train service thereover was scheduled for once a week. The train would originate at Marshalltown and move to Minerva Junction and thence over the branch line to Roland and return. However, in 1973 and 1974 there were only 40 and 31 round trips, respectively, on the line. The crew consisted of a conductor, engineer, and brakeman from the employee extra board. Because of the condition of the line, trains were operated, for the most part, at 5 mph so that a round trip averaged about 2 days with the crew operating on overtime. In the event of abandonment, rail service would be discontinued at the following stations, with populations (pop.) and milepost location (MP) shown in parenthesis: Minerva (pop. 0) (MP 247.1), Clemons Grove (pop. 178) (MP 250.8), St. Anthony (pop. 156) (MP 252.9), Zearing (pop. 535) (MP 258.6), McCallsburg (pop. 307) (MP 263.4), and Roland (pop. 803) (MP 269.1). All of the stations are located on paved county roads. Minerva is located 10 miles from applicant's line of railroad at Albion, Iowa; Clemons Gove and St. Anthony are 7 and 9 miles, respectively, from C&NW's line at State Center, Iowa; Zearing is 5 miles from

McCallsburg which is served by the Rock Island Railroad; and Roland is 5 1/2 miles from C&NW's line at Story City. The only agency station on the branch line is at Clemons Grove, and no passenger service is conducted over the line which is located in an agricultural area.

C&NW has established what are called 25-50 car rates on grain. These rates require the use of from 25 to 50 covered hopper cars (100 tons), called jumbo hopper cars, to make the minimum weight on a movement, and they also require five consecutive train movements. Such rates are lower than the rates on single cars. These hopper cars are too large to move over the branch line where 40-foot boxcars are used to move grain (corn and soybeans). There is less expense in loading grain in hopper cars and less chance of grain loss than in boxcars. None of the stations on the branch line is more than 18 miles from a C&NW 25-50 carloading site. To avail itself of the 25-50 carload rates, a shipper would have to move approximately 480 truckloads of grain to the carloading site. Total corn and soybeans production in Marshall and Story Counties in 1973 and 1974 has been the equivalent of 19,840 and 16,700 rail carloads, respectively, and applicant estimated such production in 1975 at the equivalent of 18,838 cars. Export grain movements commencing in 1973 and extending into 1974 brought huge profits to C&NW's railroad system, and the movement of grain has a great bearing on its financial condition. Corn production in Marshall County increased from 12,788,000 bushels in 1970 to 13,890,000 bushels in 1974, and in Story County from 12,505,000 bushels to 14,245,000 bushels in the same years. Soybean production in Marshall County increased from 2,425,000 bushels in 1970 to 2,516,000 bushels in 1974, and in Story County decreased from 3,553,000 bushels to 2,747,000 bushels in the same years. Fertilizer purchased in Marshall County increased from 22,351 tons in 1970 to 36,424 tons in 1974 and in Story County from 16,862 tons to 43,205 tons in the same years. The Iowa Department of Agriculture projects substantial increases in future grain yields in Story and Marshall Counties. In the movement of grain, truck rates increase during periods of greater transportation demand.

The average numbers of cars per mile per annum of freight originating and terminating on the branch line in the most recent 5-years period of operation were as follows: 1970—63 cars, 1971—44 cars, 1972—44 cars, 1973—36 cars, and 1974—17 cars. The bulk of the traffic on the line consists of outbound shipments of grain (corn and soybeans), and while there are, collectively, a number of other commodities handled over the line, inbound shipments consist principally of frertilizer and lumber. Of 1,073 cars moved over the line in 1973, 893 were outbound shipments of corn and soybeans. In that year, shippers ordered 1,125 grain cars and were furnished 899 of such cars or 80 percent of the number ordered. Of 517 cars handled over the line in 1974, 318 were grain shipments. Although shippers on the line ordered 890 grain cars in 1974, they were furnished only 284 such cars, all of which were utilized, together with others. C&NW states that in 1973, this Commission advised it of complaints from shippers that the Roland branch line, under consideration here, was being furnished more grain cars than other nearby lines. Whereupon, in 1974 C&NW furnished the Roland line with only 32 percent of the cars ordered which was the same percentage of cars furnished on an average to other branch lines in C&NW's Central Division, in which operating division the Roland line is located. However, the Ellsworth line in that division, with five grain elevators, received 57 percent of the boxcars ordered in 1974. The 11 mile segment of the branch line between Zearing and the end of the line at Roland, which segment serves McCallsburg and Roland constitutes 37 percent of the entire branch line. McCallsburg and Roland generated 39 percent of the total carload traffic on the line in 1973 and Roland alone accounted for 29 percent of the branch line carloads. In 1974, McCallsburg and Roland generated 40 percent of the carloads and Roland alone accounted for 35 percent of total cars moved on the line.

The C&NW has considered abandoning the Roland line in its entirety, or in part, on numerous occasions extending back to 1961 when its board of directors authorized the filing of an application for abandonment. There have been differing opinions among C&NW officials, over the years, in considering the branch line's financial and traffic history and future as to whether such abandonment should be affected. At a meeting in 1970, C&NW's assistant-vice president advised Roland line shippers that traffic on the line would not support upgrading of the branch line nor maintenance to keep it operational over a protracted period and that the line in all likelihood would be abandoned within the next 6 years. In December 1974, when faced with cost of rehabilitating the line, C&NW determined to file the instant application.

The Roland line was operated at a loss in 1960 and at profits of approximately $25,000, $30,000, and $55,000 (profits less taxes and roadway depreciation), respectively, in 1961, 1962, and 1963. The Roland line was operated at a profit of $6,000 in 1967, a loss of $(29,000) in 1968, and a profit of about $41,000 in 1969 which applicant believes was overstated by approximately $31,000. Profit or loss figures were not developed at the hearing for the years 1964-1966, or 1970-1972.

Financial results, as submitted by the rail carrier, of operation of the branch line for the years 1973 and 1974, respectively, were as follows: other revenue $864 and $8,463 and freight revenue $281,989 and $152,593, of which $25,926 and $23,077 were assigned to the branch line; revenue from leases $713 each year; operating expenses consisting of maintenance-of-way and structures $58,176 and $53,947; maintenance of equipment $2,092 and $1,762; transportation $61,421 and $56,241; car costs $33,611 and $24,383; expenses of handling traffic on lines beyond the branch line, based on 50 percent of the revenues apportioned thereto, $128,463 and $68,989; payroll taxes $9,027 and $11,402; total revenue being $283,566 and $161,769 and total expenses being $292,790 and $216,724 producing a net railway operating (loss) of $(9,224) in 1973 and $(54,955) for 1974. McCallsburg and Roland generated 39 percent of the total freight revenue produced on the branch line in 1973 while Roland alone accounted for 30 percent of such revenue. In 1974, McCallsburg and Roland generated 39 percent of the branch line revenue, while Roland alone produced 35 percent of such revenue.

Freight revenues are those received from the transportation of freight either forwarded from or received at points on the branch line and allocation to the branch line was made on a mileage basis; other revenue included demurrage and miscellaneous revenue; maintenance-of-way expense is actual except for snow removal based on a 5-year average; payroll taxes and fringe benefits were applied to labor costs; maintenance of equipment expense was developed by applying system averages to locomotive unit miles or caboose car miles as applicable; transportation employees' expenses and other transportation expenses are actual, except train fuel which with servicing train locomotives' costs, freight loss and damage, and a minute portion of train supplies' costs were developed from system averages; and domestic and foreign car costs were based on per diem and mileage costs, which mileage expense was applied to private car costs.

Several of applicant's expense items require special consideration and revision. In 1970, C&NW performed bridge maintenance on the line for which it paid, but in 1973 it paid an extra $5,079 in a labor dispute arising from such earlier work. In effect, applicant paid for the same work twice because of a labor contract dispute, and the

$5,079 settlement paid in 1973 for 1970 work is not a savable expense and will be disallowed.Payroll taxes for 1973 approximate 10 percent of labor costs, and health and welfare benefits are about 5 percent of such costs, and proportionate reductions must be made in those expense items as such percentage factors relate to the disallowed bridge maintenance of $5,079.

"Servicing train locomotives" expenses were submitted on a system-unit locomotive basis. The reduction of once-a-week service, resulting from an abandonment of this line would not appear to reduce the servicing necessary to a locomotive for its overall operation. Appliant did not submit a basis to establish this cost would be savable by the proposed abandonment, and the alleged expense from servicing train locomotives will be disallowed.

Freight loss and damage expenses were based on a system multiplier for each year. The $6,164 claimed as 1973 freight loss and the $4,772 claimed for 1974 represent about 25 and 33 percent, respectively, of the freight revenues assigned to the line. Applicant's annual reports to the Commission, of which the Administrative Law Judge has taken official notice, show that "loss and damage-freight" was 2.2 percent of freight revenues in 1973 and 2.8 percent in 1974. Statistics, of which the Administrative Law Judge has also taken official notice, published by the Commission as Statement No. ICI-73, Rail Carload Cost Scales, 1973, appendix A, reflect that nationwide freight loss and damage to commodities of the type moving over the branch line approximates the percentage figures reflected in C&NW's annual reports and noted above. Consequently, the Administrative Law Judge believes applicant's freight loss and damage expense should be reduced to $551 for 1973 (2.2 percent of freight revenues assigned to the line) and $409 for 1974 (2.8 percent of freight revenues assigned to the line), and the remainder of the claimed freight loss and damage will be disallowed. Applicant's freight loss and damage related to system revenues is included in the 50-percent factor used in determining expenses for handling traffic beyond the branch line.

Adjustments for: disallowed bridge maintenance $5,079 in 1973 and disallowed health and welfare benefits $254 and disallowed payroll taxes $508 thereon; disallowed expense of servicing train locomotives $305 (1973) and $269 (1974); and disallowed freight loss and damage $5,613 (1973) and $4,363 (1974), produces a net profit of $2,535 for 1973 and a net (loss) of $(50,323) for 1974, in the line's operation.

As of September 30, 1975, applicant had total assets of $460,279,311, consisting of current assets of $97,527,384, special funds $7,538,771, total investments $17,158,175, total properties less recorded depreciation and amortization $332,652,726, and other assets and deferred charges $5,402,255. Total liabilities as of that date were $460,279,311, consisting of current liabilities $107,449,516, long-term debt due within 1 year $27,085,092, long-term debt $291,370,778, reserves $16,236,658, and other liabilities and deferred credits $9,694,291. Shareholders' equity totalled $8,442,976, including total retained income of $4,033,630 for the period June 1, 1972-September 30, 1975.

From 1964 through 1967, Chicago and North Western Railway Company, a predecessor in interest of applicant had an average annual net income of $12,340,000. From 1968 through the first 5 months of 1972, that predecessor was owned by Northwest Industries, Inc., at which time the railway company was acquired by applicant. For 1972 (last 7 months), 1973, 1974, and 1975 (first 9 months), applicant had, respectively, net railway operating income (deficits shown in parenthesis) of $14,115,494, $19,583,536, $7,401,113, and $(8,528,438); other income of $4,000,190, $10,864,156, $14,360,591 and $9,251,306; ordinary net income, after fixed charges, miscellaneous deductions and other deductions of $7,058,463, $12,032,489,

$(982,771) and $(17,255,331). Extraordinary and prior period items in 1972 and 1973 increased ordinary net income to net income, respectively, of $8,472,473, and $13,799,295. Applicants' net income for the 11 months ending November 30, 1975, was $(16,468,060).

C&NW states that if it is required to restore the branch line, funds must come out of operating revenues budgeted for main and feeder lines. C&NW will build a new automatic classification railroad yard at Marshalltown, in the near future, at a cost of $35 million which it expects to pay for out of increased business and productivity. For the last 7 months of 1972 and from 1973-1975, C&NW averaged $11,650,000 each year in capital "road" expenditures. The "road" category includes capital expenditures for roadbed, bridges, and track structures.

Zearing Fertilizer, Inc., operates a "country" elevator facility on the branch line at Zearing where it purchases, stores, and sells grain (corn and soybeans) and fertilizer. In 1973, it commenced the substantial use of private trucks, and now operates four tractor-trailer units, because it was unable to obtain sufficient railcars. Its fertilizer presently moves to Zearing by truck, or by rail to Colo., or Hartford, Iowa, from where it is trucked to Zearing. Shipper states that if once-a-week rail service, with sufficient cars, was available at Zearing, it would use rail service entirely. In 1972, 1973, and 1974, Zearing Fertilizer received and shipped 131, 154, and 43 railcars, respectively, on the branch line. In 1973 and 1974, it shipped 1,276 and 1,409 truckloads of grain, respectively, being the equivalent of 555 and 613 railcars.

Mackin Grain Company operates a country elevator at St. Anthony where it dries, buys, stores, and sells grain, and acts as an agent for fertilizer companies. Prior to 1973, it shipped almost exclusively by rail but had to switch to truck because of lack of service and cars. In 1972, 1973, and 1974, Mackin shipped 134, 128, and 64 railcars, respectively. In 1973 and 1974, it shipped 108 and 180 truckloads of grain, respectively, being the equivalent of 43 and 71 railcars.

The Farmer Cooperative Association of Roland and Nevada, Iowa, operates an elevator at Roland where it sells grain and fertilizer. In 1974, the Association constructed a new grain elevator facility at Nevada on applicant's main-line track. It is presently moving its fertilizer by rail into Nevada then by private trucks to Roland, and its grain moves out of Roland by truck. Shipper is also constructing a fertilizer facility at Nevada but anticipates continued grain and fertilizer rail shipments at Roland if service is available. The Association estimates future annual traffic at Roland to total 150 rail cars, consisting of 50 cars of inbound fertilizer and 100 cars of outbound grain, as compared to over 400 cars a year from 1969 through 1972. This reduction in its rail traffic is due to the use of the new Nevada facility, and in a heavy demand situation most of its grain would be shipped from Nevada because of utilization thereof the 25-50 car rates.

The Farmer's Cooperative Company (McCallsburg Branch) operates an elevator at Zearing where it buys and sells grain and fertilizer. Prior to 1973, it was primarily a rail shipper, then began to ship by both rail and truck, and in 1974 shipped chiefly by truck because it could not obtain railcars. It is pesently shipping by truck, but in 1975 moved 62,000 bushels by truck to McCallsburg for subsequent shipment on the Rock Island Railroad. In the fall of 1974, a C&NW reprsentative advised shipper that with the increase in its hopper fleet, more boxcars would be available on the Roland line. In 1972, 1973, and 1974, this elevator shipped and received 269,172, and 93 cars, respectively, on the branch line. In 1973 and 1974, it shipped 392 and 375 truckloads of grain, respectively, being the equivalent of 169 and 160 railcars. This shipper believes its business will be seriously damaged if rail service is not restored.

Farmer's Cooperative Company also operates grain elevator facilities at McCallsburg. At that point it has an elevator located on the Roland line and a newer and larger elevator on the Rock Island Railroad where it uses jumbo hopper cars and ships in multiples of four such cars. Prior to 1973, it shipped 100 percent by rail. In the past it has used C&NW and Rock Island from both facilities, moving by truck between the facilities. It prefers to use the hopper cars on larger sales. In 1972, 1973, and 1974, these elevators shipped or received 29, 78, and 24 cars, respectively, on the branch line. This shipper states that if C&NW restores service on the Roland line, it would make some use of such service.

DeSoto Kerns has a plant on a branch line rail siding at Roland where it assembles ready-to-finish furniture and receives lumber shipments. In 1972, 1973, and 1974 it received 37, 45, and 46 cars of lumber transported by C&NW. Since the line was taken out of operation, Kerns has received its lumber by rail (C&NW) at Story City, then moved it by private truck to Roland, which is more costly than rail service direct to Roland.

Minerva Valley Fertilizer Co. is engaged in the fertilizer business at Minerva. Prior to the branch line being embargoed it received fertilizer principally by rail. Since operation over the line ceased, it has moved fertilizer to Minerva direct by truck or from a railhead, usually at Albino. In 1970, the switch at Minerva was damaged and has not been repaired, so that cars could not be set out for unloading at Minerva until the train was on the return trip from Roland. As a result the empty cars would not be removed until the train made its next trip over the line in a week or 10 days. If the C&NW had repaired the switch then loaded cars could be delivered at Minerva on the outbound trip, then unloaded and the empty cars picked up by the train on the return trip from Roland, resulting in less car cost attributable to the line. In 1972, 1973, and 1974, Minerva Valley Fertilizer received 40, 45, and 25 cars, respectively, by rail on the branch line.

Staples Lumber is engaged in the lumber and ready-mix concrete business at Zearing. It has received lumber and bag white cement by rail. In 1972, 1973, and 1974, it received 0, 3, and 2 cars, respectively, on the branch line.

Clemons Grain & Supply Company operates a grain elevator at Clemons Grove. In 1972, 1973, and 1974, it shipped 235, 161, and 96 cars, respectively, on the branch line. In 1975, after the branch line was embargoed, Clemons Grain shipped exclusively by truck. In 1973 and 1974, it shipped 374 and 459 truckloads, respectively, of grain, being the equivalent of 143 and 162 railcars.

The evidence presented by protestants, collectively, establishes: That in 1959 when the M&StL owned the branch line, two trips a week were made over the line and trains ran at 25 mph, making a round trip in 1 day; that the first embargo on the line occurred in 1968, and the C&NW admits that the line has deteriorated under its ownership. Shippers on the branch line have complained to the C&NW of its service, have tried to get better service, and at one time offered to contribute $150,000 to the applicant towards a renovation of the line. Opposing shippers consider rail service advantageous over truck service because rail service is more convenient, faster, and inexpensive in loading grain; prompt payment to shipper for his grain can be received by "sight" draft when rail is used whereas payment for truck shipments requires a week or more; less handling by rail results in less "shrink" i.e., loss by spillage, et cetera. The use of truck service to other railheads is more expensive to farmers located in the branch line area. Farmers receive better bids on their grain when rail service is available. The added cost to shippers of selling grain on truck bids, i.e. shipping the grain sold by truck, as compared to sales on rail bids, where the grain sold is transported by rail, is 6.5 cents per bushel on corn and 9 cents per bushel on soybeans. It is not economically feasible to use trucks from the elevators to a railhead where 25-50 multiple-car rates are in effect as the lower rates are offset by storage, handling, and trucking costs. Shippers on the Roland line handling fertilizer have a total storage capacity of 5,452 tons, and it costs an average of $10 per ton more to ship by truck than by rail which increased cost the dealer includes in his sale price so that the farmer bear the increased costs. In 1974, the dealers on the Roland line sold 11,881 tons of fertilizer. The gross investment in plants and equipment of shippers on the branch line is approximately $2,664,316, and assessed valuation for 1975 of their real estate was over $1 million.

The United Transportation Union requests, if the application is granted, imposition of the so-called "Burlington" conditions for the protection of employees who may be adversely affected thereby. C&NW has no objection to the imposition of such conditions.

DISCUSSION AND CONCLUSIONS

In determining under section 1(18) of the Interstate Commerce Act whether the present or future public convenience and necessity permit abandonment of the branch line, a determination must be made as to whether continued operation of the line by applicant constitutes an undue burden upon it and interstate commerce compared to the disadvantages and inconveniences to the users of the branch line if operations were discontinued. In applying the standard "public convenience and necessity" the Commission is given a wide range of discretion. *Southern Railway Company* v. *United States*, 180 F. Supp. 189. Among matters to be considered in this connection are the use being made of the line, the need of the public for the service it provides, traffic potential and reasonable expected revenues from continued operation of the line, and the financial ability of the railroad to continue operation over the line.

Shippers located on the branch line between Minerva Junction and Zearing, would incur hardships from its permanent abandonment. Collectively, they would suffer competitively, have continuing higher costs in alternate means of truck transportation, a reduction in working capital which would be tied up in grain shipments by truck and more loss of grain through truck handling, as a result of such abandonment. Farmers in the area would suffer from higher truck costs being passed on to them by the grain elevators. In fact, the Commission has recognized that grain elevators operate under severe handicap without rail service. See *Northern Pac. Ry. Co. Abandonment and Construction*, 324 I.C.C. 750. The Administrative Law Judge believes that shippers on that segment of the line servicing McCallsburg and Roland would not suffer hardships but would be inconvenienced by an abandonment of the line at those points. However, it does appear from their experience since the line was taken out of service that the Roland line shippers' businesses and the area could survive permanent abandonment of the line. Strictly considered, the present financial straits of the C&NW would outweigh the public's need for the line's continuation if upon the rendering of reasonable service the line were not profitable or would not at least pay its own way.

Applicant chose to present financial results of operation of the Roland line for only 2 years, 1973 and 1974, and from that presentation the Administrative Law Judge concluded that applicant operated at a small profit in 1973 and a loss of $(50,323) for 1974. Protestants were able to develop financial information from the C&NW as to operation of the line for 7 years in the 1960's reflecting that the line was profitable in 5 of those 7 years with results ranging from a $(29,000) loss in 1968 to a $55,000 profit in 1963. Considering the dismal service on the line in 1974, it is not surprising that C&NW incurred a loss in its operation for that year. Only 31 trips were made over the line in 1974, slightly more than one trip every 2 weeks, and although shippers on the Roland line used nearly all the grain cars ordered in 1973, they were furnished only 284 cars, out of 890 ordered, in 1974, all of which were utilized. Expenses on the Roland line remained fairly constant in 1973 as compared to 1974 while 1973 revenues were almost half of those in 1974 which can be attributed to the paucity of service. In these circumstances the Administrative Law Judge is not satisfied that 1974 would have been an unprofitable operation for the Roland line if reasonable service had been rendered thereover.

Applicant in a proceeding of this nature must establish the burden which continued operation of the line would have upon it. Applicant has not sustained the burden of showing that regardless of the manner in which that segment of the line between Minerva Junction and Zearing is operated, it would still be construed as a burden upon it or upon interstate commerce. Shippers on the branch line have been rail oriented over the years until 1973 when the poor rail service required substantial diversion to trucks. They desire the availability of rail service, will make every effort to utilize it if properly provided, have sought to have it improved over the years, and their interest here is real and practical and not simply community pride concerned with a mere desire for the existence of a railroad track through their area. Substantial increases in grain yields and in fertilizer usage in Story and Marshall Counties are predicted for the future. The potential for rail traffic and commensurate revenues on that segment of the line between Minerva Junction and Zearing is apparent from the amount of grain moved by shippers by truck and which they desire to move by rail if reasonable service and cars are made available. An average of 63 cars per mile per annum were handled on the line in 1970 and 44 cars per mile in each of the years of 1971 and 1972, and applicant chose not to present financial results for operation of the line in those years, and no assumption can be made that those years involved a loss on the line. The potential in cars per mile per annum on the segment of line between Minerva Junction and Zearing greatly exceeds the number handled on the entire line during those 3 years. Applicant replies that it does not have the cars to handle grain traffic on the Roland line, but its failure to provide such cars is not justification in the Administrative Law Judge's opinion for abandoning the line. With C&NW's increased use of jumbo grain hopper cars on other lines, there appears, as its representative stated to a Roland line shipper, relief is in sight for the availability of boxcars for grain shipments on the Roland line. Traffic potential and reasonable expected revenues, in light of other matters, warrant continued operation of that segment of the branch line from Minerva Junction to Zearing.

A different conclusion must be reached as to the segment of the branch line extending beyond Zearing to Roland which serves McCallsburg and Roland. Certainly in the past this segment of the line has produced its proportionate share of the traffic and revenue on the Roland line but that appears unlikely in the future. Because of its new facility at Nevada and the use of 25-50 hopper car rates, the Farmers Cooperative Association estimates future traffic at its Roland elevator at 150 cars a year as compared to past traffic of over 400 cars a year from 1969 through 1972. The Farmers Cooperative Company has rail service available by the Rock Island at its large elevator at McCallsburg where it can use hopper cars. Its use of the Roland line, where its smaller elevator is located at McCallsburg, was not substantial in 1972-1974, and it can only hold out, if service on the Roland line is restored, to make some use of C&NW's service. Accordingly, rehabilitation and continued operation of this segment of the line would constitute a burden upon the C&NW and interstate commerce. Considering the Roland elevator intends to principally use its facility at Nevada for rail shipments, that the McCallsburg elevator has alternate rail service, the reduced traffic on this segment, and the present poor financial condition of applicant, the Administrative Law Judge concludes that the application insofar as it involves the segment of branch line serving McCallsburg and Roland should be denied.

A material issue has been raised by protestants as to the deliberate downgrading of service by the C&NW on the Roland line. In *Missouri-Kansas-Texas R. Co. Abandonment, Okla.*, 338 I.C.C. 728, the Commission established general evidentiary criteria relating to the "downgrading of service" issue, to-wit: (1) the nature of the service and the public need shown in the past for the service; (2) the effect of the carrier's act; (3) the need demonstrated by a carrier to economize under the implied intent test; and (4) any evidence as to a specific intent to deliberately downgrade for the purpose of turning what could be a profitable operation into a deficit operation in perfecting a case for abandonment. As to the "need to economize" in (3) above, the carrier should show, in answer to charges of deliberate downgrading, (a) whether, on a systemwide basis, this carrier is either only marginally profitable or operating at a deficit; (b) whether the particular line under consideration is marginally profitable, operated at a deficit, or would have been operated at a deficit were it not for the deferral of maintenance and rehabilitation costs; and (c) whether the carrier can clearly show that its available funds for maintenance and rehabilitation are required for those portions of line within its system for which a greater public need has been demonstrated and which offers a larger profit potential for the carrier, and that the carrier has definite proposals as to how such expenditures are being made or will be made.

The C&NW has not shown that it has met the criteria above for its need to economize, in considering the maintenance afforded the Roland line. The line was acquired by the C&NW in 1960 and its deterioration has taken effect over a 15-year period. Financial information was furnished by the applicant, systemwide, for 1972-1975 and reflected deficit operations only in the last 2 years. Again financial results for operation of the line were submitted by C&NW for 1973 and 1974 only, and this, in light of information submitted by protestants, does not establish that the line was marginally profitable or operated at a deficit during the years when it deteriorated after acquisition by applicant. Further, C&NW has not clearly shown that available funds were required for other lines on its system during the entire period when the line was deteriorating, particularly from its acquisition in 1960 to its poor condition in 1968 when the line was first embargoed by C&NW. The need to economize by the carrier, to justify deferred maintenance on the line, should be shown for the period when the line was not properly maintained and not at a time after the line has deteriorated. C&NW has failed to make such showing here. This reflects an implied intent on the part of C&NW to downgrade service on this line, supported by the fact that C&NW's Board of Directors authorized abandonment of the line within a year after it was acquired, and in 1970 Roland line shippers were advised by C&NW's representative that the line would be abandoned within a few years. C&NW did appear willing to defer abandonment of the line so long as operations were profitable with minimum maintenance. The fact that C&NW acquired the Roland line at a time when twice weekly service was performed at 25 mph, and within 8 years let it deteriorate to the point where it was first embargoed and within 14 years to the point where service was performed about every 2 weeks at 5 mph, and then took it out of service because of its poor condition, all the while bearing in mind an intention to abandon it, leaves the Administrative Law Judge no choice but to conclude from this record that C&NW deliberately downgraded service on the line. Applicant would make much of greater maintenance funds expended on the line as compared to certain other grain lines but such is of no consequence in the absence of comparative usage, revenues, and detail respecting such lines.

Rehabilitation of the entire Roland line is estimated at $813,935. Reducing such estimate by 37 percent for that segment of the line between Zearing and Roland which the Administrative Law Judge believes the C&NW should be permitted to abandon, would leave an estimated rehabilitation cost of about $512,779 for the remaining segment. The *Missouri-Kansas-Texas Abandonment* case, *supra*, indicates that applicant's rehabilitation burden could be rejected because of its failure to fulfill its affirmative duty to maintain the line in reasonable operating condition. Certainly it bears on the equities of the situation, but considering C&NW's financial condition, the Administrative Law Judge does not believe he is required to, nor should he, disregard such rehabilitation costs. Applicant's financial condition is not presently good. Its balance sheet as of September 30, 1975, reflected a working capital deficit, and it had a net income (loss) of $(982,771) for 1974 and $(16,468,000) for the first 11 months of 1975. However, the C&NW has conducted profitable operations in the past and there is no indication from applicant that it does not expect to return to profitable operation with a resulting improvement in its financial picture. Funds for rehabilitation of the line to Zearing must be taken from those now budgeted for other lines on the system, but applicant appears able to manage this, and it does not appear unfair in the circumstances. In view of the potential traffic and revenues on the line from Minerva Junction to Zearing, and from the record, applicant has not established that rehabilitation thereof would be economically unjustified. Applicant estimates salvage value of the entire line at $339,967 and a pro rate share for abandonment of the Zearing-Roland segment (37 percent) would afford it an estimated salvage value of $125,758 which could be available for application towards restoration of the segment of line not permitted to be abandoned. By a shortening of the Roland line, applicant will reduce future maintenance-of-way costs by about 37 percent and after rehabilitation should be able to operate over the line at 10 mph in a weekly service and thereby reduce train crew wages and our costs. The providing of a regular service with sufficient rail cars by C&NW should enable shippers to make full utilization of the rail service.

In summary, the Administrative Law Judge concludes that there is an evident public need for continued rail service on the branch line to Zearing, and that public convenience and necessity does not permit its abandoment but does permit abandonment of that segment of the line between Zearing and Roland which serves McCallsburg and Roland. The equities of the situation support such conclusion, and C&NW's objections thereto must "fly into the face" of its having downgraded service on the line by failing to maintain it, of reducing train service on the line, of failing to furnish rail cars, and finally, as our courts have held in pending litigation, unauthorizedly abandoning the Roland line.

For the protection of railway employees and in accordance with Commission policy, any certificate issued herein should include by reference, labor protective provisions similar to those prescribed in *Chicago, B. & Q. R. Co. Abandonment*, 257 I.C.C. 700.

By order of the Commission served July 16, 1975, it was determined that based on an Environmental Threshold Assessment Survey prepared by this Commission, no environmental impact statement need be issued in this proceeding as it does not represent a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, and said determination was affirmed by the Commission under order dated September 29, 1975. No additional environmental facts were presented at the hearing which warrant further consideration by the Administrative Law Judge.

ULTIMATE FINDINGS AND ORDER

The Administrative Law Judge finds that, subject to the imposition of conditions for the protection of railway employees as prescribed in *Chicago, B. & Q. R. Co. Abandonment*, 257 I.C.C. 700, the present and future public convenience and necessity permit abandonment by applicant of that portion of its branch line of railroad extending from Zearing, Iowa, westerly, to the end of the line at milepost 269.6 at Roland, Iowa, a distance of about 11 miles, in Story County, Iowa, EXCEPT any of such line at Zearing which serves shippers or consignees at that station; and that the application in all other respects should be denied.

The Administrative Law Judge further finds that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

Premises considered, it is the ORDER of the Administrative Law Judge that:

Subject to the conditions for the protection of railway employees noted above, the present and future public convenience and necessity permit abandonment by Chicago and North Western Transportation Company of that portion of its branch line of railroad extending from Zearing, Iowa, westerly to the end of the line at milepost 269.6 at Roland, Iowa, a distance of about 11 miles, in Story County, Iowa, EXCEPT any of such line at Zearing which serves shippers or consignees at that station; and that the application in all other respects be, and it is hereby, denied.

In the event any person or Government entity is considering an offer of financial assistance to enable the rail service involved to be continued, then such person or Government entity should promptly give notice that it is considering such an offer by certified mail to carrier-applicant and by first-class mail to all parties of record and the Commission;

Applicant railroad shall, within 10 days after receiving notice that an offer of financial assistance is being considered, make available to the party considering the offer of financial assistance the information described under the heading "Railroads Seeking Abandonment Authority," which appears in the attached Notice of the Commission entitled "Procedures for Pending Abandonment Cases," served March 31, 1976, and published on that date in the Federal Register, 41 F.R. 13691 (hereinafter called the Procedures), and such information shall be made available in the manner described in the Procedures;

Upon this order becoming administratively final, notice of the finding of public convenience and necessity made herein shall be published in the Federal Register pursuant to the requirements of section 1a(6)(a) of the Interstate Commerce Act, as amended;

Notwithstanding any notice that financial assistance is being considered that may have been given pursuant to the above ordering paragraph, any person or Government entity desiring to offer financial assistance to enable the rail service involved to be continued shall, within 15 days of publication in the Federal Register of the above-described finding of public convenience and necessity, send notification of such offer by certified mail to applicant railroad and the Commission and by first-class mail to all parties of record, and such notification shall include the terms and information described under the heading, "Persons Offering Rail Service Assistance," which appears in the Procedures;

If the Commission finds that a financially responsible person has offered financial assistance in accordance with the Procedures, the Commission shall postpone the issuance of a certificate of abandonment for such reasonable time, not to exceed 6 months, as is necessary to enable such person or Government entity to enter into a binding agreement with the applicant railroad to provide financial assistance for continued rail service or to purchase the rail line;

When the Commission is informed of the execution of any financial assistance agreement or acquisition and operating agreement, the issuance of the certificate of abandonment shall be postponed for such period of time as such an agreement (including any extensions or modifications) is in effect;

All correspondence to the Commission with respect to offers of financial assistance for the continued operations or acquisition of the subject line shall contain an appropriate reference to the subject proceeding; and that on the lower left-hand corner of envelopes containing such correspondence the following notation shall be typed in boldface "AB-RSCP";

Subject to the conditions set forth above, an appropriate certificate of abandonment shall be issued, and the applicant shall not effect any abandonment prior to the effective date of such certificate of abandonment;

Unless the authorization herein granted is exercised within 1 year from the effective date of such certificate of abandonment this order shall be of no further force and effect;

This order shall be effective 20 days from the date of service in the absence of an appeal or of a stay by the Commission.

Dated at Washington, D.C., this 16th day of July, 1976.

FINANCE DOCKET NO. 28322[1]

CHICAGO SOUTH SHORE AND SOUTH BEND RAILROAD DISCONTINUANCE OF ALL PASSENGER TRAIN SERVICE

Decided March 28, 1977

Upon investigation, found: That the operation of passenger service by the Chicago South Shore and South Bend Railroad is required by the public convenience and necessity and will not unduly burden interstate or foreign commerce and such operation is ordered continued for a period of 10 months from the service date of this report and order. Investigation discontinued. The companion abandonment application is granted with conditions.

John H. Gobel, Harry N. Babcock, Gerald A. Costello, and *Alan A. Rudnick* for the railroad.

Thomas F. Harrison for the United States Environmental Protection Agency, *Ronald L. Dyer* for the public of the State of Indiana, *Gale I. McGrew* for the Indiana Public Service Commission, *Bernard Rane* for William R. Quinlan, Corporation Counsel, city of Chicago, *William J. Scott, Hercules F. Bolos,* and *Mary C. Ubatuba* for the Illinois Commerce Commission, and *Joseph L. Skozen* and *G. James Frick* for the Northwestern Indiana Regional Planning Commission.

Robert D. Fritz, Ronald L. Kroening, George B. Lee, Gordon P. MacDougall, John W. McGinness, John J. Naughton, George J. Nixon, Lester C. Peach, Max A. Reinstein, and *Jared H. Silberman* for protestants.

Orren Beaty for intervener in support of protestants.

Michael Falk for the Interstate Commerce Commission's Section of Energy and Environment.

REPORT AND ORDER OF THE COMMISSION

DIVISION 3, COMMISSIONERS BROWN, MACFARLAND, AND CLAPP

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[1] This report also embraces docket No. AB-136, Chicago South Shore and South Bend Railroad Abandonment of Line Over the Illinois Central Gulf Railroad Between Randolph Street and 115th Street (Kensington) in Cook County, Illinois.

BY THE DIVISION:

Pursuant to the provisions of section 13a(1) of the Interstate Commerce Act (49 U.S.C. § 13a(1)), the Chicago South Shore and South Bend Railroad, hereinafter referred to as the "South Shore" or "carrier," a common carrier by railroad subject to the provisions of part I of the act, filed a notice and supporting statement on October 26, 1976, in which it proposed to discontinue all passenger service between Chicago, Ill., and South Bend, Ind., including all intermediate points, on December 8, 1976. Copies of the notice were served and posted in the manner prescribed by section 13a(1) of the act and the regulations of the Commission.

Simultaneously, South Shore filed an application, in docket No. AB-136, under sections 1(18)-(20) of the act seeking a certificate authorizing the abandonment of its trackage rights over the line of the Illinois Central Gulf Railroad between Randolph Street and 115th Street (Kensington) in Chicago, a distance of approximately 14.2 miles. These trackage rights are for the operation of electrically propelled passenger service only and were approved in *Chicago S.S. & S.B. R. Trackage Rights, Cook County, Ill.*, 307 I.C.C. 329 (1959). The application for abandonment is supplementary to and incidental to the discontinuance application and was consolidated with the discontinuance application. Proper notices were published and posted in connection with said abandonment application.

Upon consideration of numerous protests, complaints, and requests for an investigation, by order served December 3, 1976, we instituted an investigation of the proposed discontinuance of service and directed continued operations of the trains for a period not to exceed 4 months—the maximum allowed by section 13a(1)—beyond the effective date of the notice. We also provided for the omission of an initial decision by the Administrative Law Judge and for certification of the record to us for decision. Public hearings were held at Chicago, Ill., and East Chicago, Hammond, Gary, Chesterton, Michigan City, and South Bend, Ind. Evening and Saturday hearings were scheduled to facilitate public participation. In view of the large number of people who were interested in the case but were unfamiliar with the act and our procedures, we provided the services of 10 attorneys to the public both before and during the hearings.

The Commission's staff in the Section of Energy and Environment issued a Draft Environmental Impact Statement in these proceedings on January 7, 1977. Copies were sent to more than 2,000 people who requested that we inform them about actions taken in these matters. Interested people were given 30 days or until

February 7, 1977, to comment on the draft in accordance with the Commission's regulations at 49 CFR 1108.16(d). A draft of the staff's Final Environmental Impact Statement was made available to us on February 25, 1977, and it was printed and disseminated to the public on March 7, 1977. Evidence on the environment was accepted at all the public hearings and members of the Commission's Energy and Environmental Staff were cross-examined on the contents of the Draft Environmental Impact Statement.

Briefs were filed by the railroad, the State of Indiana, the Indiana Office of Public Counselor, the city of Chicago, the Railway Labor Executives' Association (RLEA), four unions affiliated with the RLEA, and the National Association of Railroad Passengers. A joint brief was filed by the Illinois Commerce Commission, State of Illinois, the Northwestern Indiana Regional Planning Commission (NIRPC), the United Transportation Union, and the Brotherhood of Railway and Airline Clerks. Subsequent to the closing of the filing period for briefs, a letter of support for the position of NIRPC was filed by the Northeastern Illinois Planning Commission.

PROCEDURAL MATTERS

Because of the time constraint imposed by the statute, it is not possible to hold oral argument before the Commission as requested by several of the parties.[2] Accordingly, the motions are denied.

The appeal by the Illinois Commerce Commission from the presiding officer's ruling as to the date for continued hearing and from the notice of the Commission's Secretary setting docket No. AB-136 for hearing is denied.

By petition filed February 23, 1977, the National Association of Railroad Passengers asked to intervene and to file a brief. Their submission is argument on behalf of the public and they submit that limited funds and staff prevented their appearance at the hearings. We accept their reasons explaining the delay and do not think the South Shore will be unduly prejudiced by our allowing intervention. Accordingly, the petition is granted.

DESCRIPTION OF SERVICE

The South Shore is an electrically powered common carrier of both freight and passengers, and the last of its kind remaining in the country. It operates its passenger service between Chicago and South Bend, a distance of approximately 88 miles. The South Shore basically provides a commuter and other short-haul passenger service. It operates between Randolph Street and 115th Street, Chicago, a distance of approximately 14 miles, over the track of the Illinois Central Gulf Railroad under a trackage leasing agreement. In operating over the Illinois Central tracks, the South Shore makes six stops in Chicago: Randolph, Van Buren Street, 12th Street, 57th Street, 63d Street, and 115th Street (Kensington). After leaving the 115th Street stop, moving south and east, the South Shore makes two additional station stops in Illinois, the primary one being at Hegewisch, which is located about 19 miles from Randolph Street. Under its present trackage agreement with the Illinois Central, the South Shore is not permitted to carry passengers locally between 115th Street and Randolph Street, or any freight. Between Kensington and the Illinois-Indiana State line, the carrier operates under a perpetual lease of tracks owned by the Kensington and Eastern Railroad.

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[2] Requested jointly by the Illinois Commerce Commission, Northwestern Indiana Regional Planning Commission, the United Transportation Union, and the Brotherhood of Railway & Airline Clerks, and singly by the city of Chicago and Indiana Public Counselor.

Between the Illinois-Indiana State line and South Bend, operations are conducted over its own track via Hammond, Gary, Michigan City, and South Bend, serving 28 stations, many of which are flag stops. Between Gary and South Bend the line of the South Shore is single track. Most of the passengers transported by the railroad are commuters who are moved over the segment between Gary and Randolph Street during the morning and evening rush hours.

South Shore owns and operates in its passenger service a total of 49 passenger cars, consisting of 43 electrically propelled motorcars and six trailers. Five additional cars are out of service with major structural defects. The cars vary in seating capacity from 48 to 80 seats. The cars are approximately 50 years old, having been purchased between 1926 and 1929, and during cold or wet freezing weather the number of cars out of service or involved in breakdowns reduces the total available seating capacity drastically. The equipment is operable in multiple units, and the carrier's trains can be composed of any number of cars to a maximum of eight.

Through the years, the number of revenue passengers has decreased substantially—from 6,163,798 in 1946 to 1,816,957 in 1975. Appendix A to this report gives the revenue passengers since 1946. Concomitantly, the carrier has been forced to eliminate trains and increase fares with the approval of the appropriate regulatory bodies. The present schedule has been operated since June 18, 1972.

The last fare change was in 1971; it consisted of certain increases, together with some decreases on the eastern end of the line. The last restructuring of service was in 1972. In *Chicago S. S. & S.B.R. Restructuring of Pass. Serv.*, 342 I.C.C. 154 (1972), the carrier proposed to trim its schedule from 50 daily trains on weekdays, 34 on Saturday, and 32 on Sunday, by discontinuing 22 weekday, 17 Saturday, and 20 Sunday and holiday trains. We permitted the proposal to be implemented with certain modifications regarding the number of trains to be eliminated. Basically, these modifications reduced the number of weekday trains to be discontinued from 22 to 11, thus cutting in half the number proposed for discontinuance. With this change, we permitted implementation of the proposal and the South Shore commenced operating its current schedule. Summarized, each weekday there are 20 eastbound movements and 19 westbound; on Saturday there are 9 movements in each direction; and on Sundays and holidays there are 7 in each direction.

CARRIER'S PROPOSAL

The South Shore proposes to eliminate its entire passenger service. It points to the condition of its car fleet which has long since reached the end of its physical life and is "bordering on unsafe." It argues that its financial resources are utterly inadequate to finance new equipment. Patronage has declined from 6,163,798 revenue passengers in 1946 to 1,816,957 in 1975. This decline parallels the overall decrease nationwide in passenger transit ridership. South Shore states that the public has deserted its trains for many reasons including increased affluence, the private automobile, construction of toll roads such as the Indiana Toll Road, and freeway I-94. Other reasons advanced include the growth of Chicago suburbs in Indiana away from the industrialized corridor in which the South Shore operates, and the "increased emphasis placed by the political community on development away from the corridor."

South Shore states that its passenger deficits have grown steadily, reaching an alleged $1,523,035 in 1974, $1,740,262 in 1975, and $1,766,889 for the first 9 months of 1976 after-crediting Illinois grants. South Shore contends that it should no longer be required to cross-subsidize these enormous passenger deficits from its freight revenues. It also argues that despite years of effort it has been unable to stimulate any meaningful response from the public officials and agencies of Indiana to the problems engendered by its antiquated fleet and its recurring, ballooning passenger deficits. South Shore asserts that in spite of the existence of plans, planning agencies and statements of political leaders in Indiana, there has been no realistic action, other than publicity, toward providing public financial assistance to procure new cars and to meet the operating loss generated by the service currently operated.

USE OF PASSENGER SERVICE

The South Shore had 1,734,884 passengers in 1972, 1,762,664 in 1973, 1,920,120 in 1974, 1,816,957 in 1975, and 883,490 in the first 6 months of 1976. This is down from 4.3 million in 1951, 3.9 million in 1961, and 2 million in 1971. The carrier attributes the slight increases in 1974 to gasoline shortages and extensive surfacing repairs on the Dan Ryan Expressway in Chicago.

Because the punchcard form of ticket and flashcard monthly commutation ticket used on the South Shore are retained by the passenger and not the conductor, the carrier made special studies with actual passenger counts to determine the number of passengers transported on each train. Carrier personnel counted the passengers using each station for each day of February and June 1976. These months were selected because one is a winter month, the other a summer month.

The survey reveals that most people travel to and from the three Chicago stations close to the Loop. After these, Gary and East Chicago are the busiest stations with between 16,000 to 17,000 people getting on and off each month, Hammond and Hegewisch had between 8,000 and 10,000, Michigan City, including the station at the car Shops, had between 6,000 and 7,000, Miller had between 3,600 and 4,400, and 57th Street, Clark Road, and South Bend had close to 2,000 each. The survey shows that the South Shore carried an average of 6,300 people one-way during each of the 20 workdays in February 1976[3] and an average of 6,000 people one-way during the 22 workdays in June 1976.

The table below summarizes the data provided for three Chicago stops, which the carrier argues is suggestive of the use made of this service.

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[3] The carrier apparently counted Monday, February 16th, the day designated for the celebration of George Washington's birthday as a workday. However, the reduction to 19 workdays would not appear to invalidate to any large degree the average given.

TABLE I

On-off summary February and June 1976, Randolph Street; Van Buren Street; and Roosevelt Road

	February 1976		Number of days	June 1976		Number of days
	On	Off		On	Off	
Total passenger	64,671	61,019	29	66,355	65,075	30
Total workdays	58,942	56,087	20	61,448	60,339	22
Saturday total	3,763	2,920	4	3,419	3,005	4
Sunday total	1,966	2,012	5	1,488	1,731	4
Workday average	2,947	2,804	20	2,793	2,743	22
Saturday average	941	730	4	855	751	4
Sunday average	383	402	5	372	433	4

The carrier also did a study on a peak period use. This study included all trains arriving at Randolph Street before 9 a.m. and all trains departing that station between 4 p.m. and 6 p.m., excluding Saturdays, Sundays, and holidays.

TABLE II

On-off summary February and June 1976, at Randolph Street

Origin/destination station	February 1976				June 1976			
	On	Percent	Off	Percent	On	Percent	Off	Percent
Calumet Harbor & Hegewisch	8,402	11.8	10,032	13.4	8,305	11.1	9,417	12.3
Lake County	50,185	70.3	51,795	69.3	52,421	70.2	53,499	69.8
Porter County	4,431	6.2	4,366	5.8	4,706	6.3	4,636	6.1
La Porte County	6,661	9.3	6,805	9.1	7,342	9.8	7,208	9.4
St. Joseph	1,740	2.4	1,760	2.4	1,968	2.6	1,843	2.4
Total	71,419	100.0	74,758	100.0	74,742	100.0	76,603	100.0

The figures developed by the carrier do not significantly vary from the results of a 1-day study undertaken by the Section of Energy and Environment of this Commission to evaluate the environmental impacts associated with the South Shore proposal. The weekday survey was performed on November 17 on all westbound trains. The westbound survey was expected to cover nearly all the people riding the trains in both directions since the bulk of trips made either originate or terminate in Chicago. Of the weekday travelers, 2,788 usable response questionaires were received. No tally of the number distributed was made, and not all passengers answered all questions. The riders answering questions about their origin stations represented 2,729 responses, and those responding to the destination question represented 2,472 responses.

The questionaire was circulated after the posting of the carrier's Notice of Discontinuance and attendant publicity. South Shore contends it is reasonable to assume that riders would relate the survey (which carried an inscription noting it was being performed at the request of this Commission) to the carrier's proposed action and that a maximum response could be expected. Since its own average daily figures approximate those generated by the survey, South Shore asserts we should accept that its figures are reasonable.

BALANCE SHEET, INCOME STATEMENTS AND RELATED DATA

The South Shore's general balance sheet as of September 30, 1976, shows total assets of $21,757,935, including net investment in fixed plant and equipment of $13,892,970, current assets of $7,370,608, and prepaid accounts and deferred charges of $494,357. Current liabilities were $3,979,315, including $3,239,096 accounts and wages payable, and $492,447 taxes accrued. Other listed liabilities were operating reserves of $419,611 accumulated deferred income tax credits of $1,727,079, and other items of $55,723. Stockholders' equity consisted of common stock $3,959,575; unearned surplus $6,417,119; and earned surplus $5,199,513.

Cash and equivalent (special deposits plus temporary cash investments) increased to $5,388,086 on September 30, 1976, from $768,211 on December 31, 1971. Over the same period, working capital (current assets minus current liabilities) improved from a deficit position of $46,934 to a positive $3,391,293 and the current ratio (current assets divided by current liabilities) increased to 1.85 from 0.98. The company's capital structure is conservative, with no long-term debt financing employed.

In 1974, the carrier reported a net income of $1,186,457 (including an Illinois grant of $253,705); in 1975 it reported a net income of $1,380,583 (including an Illinois grant of $843,719); and for 9 months of 1976 the net income shown was $694,458 (including operating grants from Illinois of $478,708). A late filed exhibit of the carrier shows a drop in income to $950,005 for the full year 1976, including Illinois grants of $616,927. Prior to 1974, the carrier's profits were small, as shown by appendix D hereto, and there were several deficit years. The carrier states that projected data for 1977 indicate what it believes is a continuing trend of deterioration in its financial position.

FINANCIAL RESULTS OF OPERATIONS

South Shore submitted financial data reporting the results of operating its entire passenger service on both fully allocated and avoidable cost bases. Since it is seeking discontinuance of all passenger trains, it maintains that the fully allocated system is proper in this case, but points out that the avoidable cost basis yields a loss approximating that reported on a fully allocated basis. Protestants submitted no independent cost studies. South Shore introduced cost evidence through two witnesses—R. J. McGee and L. T. Klauder. Mr. McGee, vice-president and comptroller of the railroad, presented evidence based on data compiled by the carrier for reporting purposes to the Commission and expanded to report freight and passenger service operating results separately. The resulting information is also used for management and financial decisionmaking purposes. Mr. Klauder, a professional consulting engineer, had ultimate responsibility for the establishment of management and maintenance information systems for railroads and transit operations on the New York City Transit Authority, the Long Island Railroad, the Metropolitan Suburban Bus Authority of Nassau County (New York), Amtrak, the Sao Paulo (Brazil) Metrol, the Penn Central Railroad, and the Lindenwold Highspeed Line in New Jersey. He was also general manage for the Lindenwold Line's first 3 1/2 years of operation. Mr. Klauder's testimony described studies undertaken by him to reveal what expenses would be avoided upon total elimination of passenger service by South Shore.

As an electrically propelled railroad, South Shore is required to prepare and report its financial data to the Commission in the format prescribed for an Electric Class I Railway (49 CFR §§ 1200 *et seq.*). Unlike the format prescribed for nonelectric roads ("stream roads"), this format does not prescribe that the carrier separate and report freight and passenger revenues and expenses for each type of service. However, based on the accounts prescribed by the Commission, the carrier has adapted its accounting system so that revenue and expense data are segregated between the two types of service operated by South Shore—freight and passenger. The carrier has maintained this system for many years and utilizes it for management purposes.

South Shore states that it collects data as to various expense accounts which it incurs to perform its transportation services.

Many expenses are directly assignable to the type of service which caused them to be encountered. For example, wages of traincrew employees may be directly assigned to the class of service, freight or passenger, wherein the wage costs arose. Seventy-two percent of South Shore's total expenses are so directly charged.

The South Shore submitted income statements in which it separated operating results between passenger and freight for 1971-1975 and the first 9 months of 1976. The carrier had net income after Federal income taxes in 1975 of $1,380,583. Overall the South Shore has been profitable since 1971, with losses in previous years. The passenger operations have shown losses for many years while the freight business has been profitable consistently.

Revenues from passenger operations amounted to $3,789,835, including $843,719 in operating grants, in 1975 versus $3,320,179, with no operating grants in 1971. The net passenger deficit totaled $1,740,262 in 1975 versus $1,785,437 in 1971. In the first 9 months of 1976, passenger revenues amounted to $2,737,303, including $478,708 in operating grants, or 30 percent of the carrier's total operating revenue.

Freight revenues advanced from $5,594,891 in 1971 to $8,328,206 in 1975. In the first 9 months of 1976, freight revenues amounted to $6,159,287, or 70 percent of total operating revenue. Pretax income in 1975 from the freight operations was $4,244,754, or more than double the pretax freight income of $1,982,825 in 1971. In the first 9 months of 1976, net income before income tax attributable to freight operations totaled $3,064,854.

South Shore's total after tax income, combining the profitable freight business with the deficit passenger operations, advanced from $197,388 in 1971 to $1,380,583 in 1975. In the first 9 months of 1976, net income after taxes from combined operations amounted to $694,458. Annualized this gives a full year earnings estimate of approximately $926,000 well below the $1,380,583 profit recorded for the full year 1975.

Our analysis indicates that the railroad's present financial condition is satisfactory. The improvement in the financial condition in recent years is due to impressive earnings growth in the carrier's freight operations. In recent years the South Shore's passenger business has consistently operated at a deficit, and that deficit expanded significantly in 1976. Without significant increases in subsidies for the passenger operation, further substantial losses seem assured from that segment of South Shore's operations.

While South Shore's combined freight and passenger operations are profitable, the railroad's net income fell sharply in 1976 and some further decline appears likely in 1977. If the passenger operation continues to incur deficits of the magnitude experienced in recent years, South Shore in time may face financial difficulty. A continuance of these large losses will cause the quality of freight service to suffer. Of particular concern is the leveling off in freight revenues during the first 9 months of 1976, despite a rising economy. This may indicate that the freight business, which has been cross-subsidizing the passenger deficits, may not continue the growth trend of recent years.

It is doubtful that South Shore itself could borrow the funds needed to acquire new passenger equipment in the capital markets. Even if such funds could be borrowed, the necessary debt service would add considerably to South Shore's deficit and lead to a deterioration of the railroad's financial condition.

The South Shore estimates that without passenger service its working capital, excluding passenger operations, on September 30, 1976, would have increased to an estimated $5,123,283 compared with $3,391,293 on the same date as per the company's books and records. The current ratio of assets to liabilities, excluding passenger operations, would have increased to an estimated 2.28 to 1 from 1.85 to 1. A comparison of the railroad's actual operating results for the first 9 months of 1976, compared with estimated results if passenger service had stopped on January 1 of that year, indicates that net operating revenues, excluding passenger operations, would have increased to an estimated $3,246,392 from the actual $2,005,734. Net ordinary income would have increased to an estimated $1,613,240 from the actual $694,458, thus representing an estimated improvement in ordinary income of $918,782 for the 9-month period.

If the passenger operations were discontinued, South Shore would be left with a very profitable freight business. Excluding passenger operations, the operating ratio (operating expenses divided by operating revenues) would have been an estimated 47.3 percent in the 9 months ended September 30, 1976, versus 77.2 percent in the corresponding year-earlier period. Also, South Shore's return on equity for the first 9 months of 1976 based on actual and pro forma (excluding passenger operations) net income and stockholders' equity figures on September 30, 1976, shows an increase in the estimated return on equity to 12.3 percent (excluding passenger operations) from the actual 5.3 percent. All of this indicates that South Shore would be a very profitable carrier if passenger operations were discontinued.

SAVABLE EXPENSE

The South Shore submitted a separation of all revenues and expenses between passenger and freight operations for 1974, 1975, and the first 6 months of 1976. Those revenues and expenses not directly assignable to either passenger or freight service were assigned on the basis of allocation factors. While we do not agree with all of the allocation factors used, the carrier's avoidable costs are affected only in a few instances by the questionable allocation of common expenses.

There are no published standards for determining avoidable costs for an electric railway. However, we prepared a report in 1969[4] identifying the avoidable costs of passenger service for eight class I railroads providing both passenger and freight service and, more recently, the Commission's Rail Services Planning Office (RSPO) issued standards for determining commuter rail service continuation subsidies and emergency operating payments.[5] Our analysis of the South Shore's avoidable costs of performing passenger service considers the results of the 1969 study and the RSPO standards. It is as follows:

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[4] *Investigation of Costs of Intercity Rail Passenger Service*, July 16, 1969.

[5] 49 CFR 1127, first published in the Federal Register on August 3 and amended on December 28, 1976.

	1974		1975		1st 6 months 1976	
	South Shore	I.C.C.	South Shore	I.C.C.	South Shore	I.C.C.
Revenue:						
Transportation	$3,055,717	$3,055,717	$2,890,055	$2,890,055	$1,397,850	$1,397,850
Other income	295,255	298,670	887,177	899,091	393,235	393,235
Total	3,350,972	3,354,387	3,777,232	3,789,146	1,791,085	1,791,085
Expenses:						
Maintenance-of-way & structures	505,277	460,343	534,373	515,764	323,379	304,072
Maintenance of equipment	550,246	576,081	575,755	629,152	307,622	341,977
Power	352,415	456,046	441,011	522,489	252,528	298,673
Conducting transportation	1,666,352	1,599,903	1,738,419	1,664,702	910,929	877,493
Traffic	59,356	59,356	45,640	45,640	27,796	27,796
General and miscellaneous	1,132,283	758,956	1,312,056	760,236	497,443	347,508
Taxes (excluding Federal)	429,500	375,988	462,096	408,226	264,621	234,482
Total	4,695,429	4,286,673	5,109,350	4,576,209	2,584,318	2,432,001
Net savings excluding Federal taxes	1,344,457	932,286	1,332,118	787,063	793,233	640,916
Federal taxes	----------------	447,497	----------------	377,790	----------------	307,640
Net savings including Federal taxes	1,344,457	484,789	1,332,118	409,273	793,233	33,276

The major differences between our calculations are in the area of General and Miscellaneous Expenses and Federal taxes. We disallowed as avoidable the positions of president, of vice president and comptroller, and of treasurer and the claim in 1974 and 1975 of the director of purchasing. The carrier argues that it will be left with only five freight trains a day and that the operation of these trains does not require these people. South Shore in 1975 earned $8,328,206 in revenues from freight alone and we do not accept the argument that it can operate at that revenue level without these avaoidable general officers unless it becomes an integral part of the Chessie System.[6] If it could operate freight service without them, as it claims, it could presumably operate passenger and freight service without them. We agree that a portion of the wages paid to the manager of passenger services is avoidable. South Shore did not provide sufficient information to identify the amount involved. We estimate that 25 percent of this persons' salary would not exceed $5,000 and have used that amount as the avoidable expenses in this account for each of the full-year periods and half that amount for the 6 months of 1976.

South Shore claimed six avoidable positions for the first 6 months of 1976, secretaries to the president and vice president and four clerks, and these six and four more positions for 1974 and 1975. No support for the selection of these positions was offered and no explanation was given for the discrepancy between the full-year periods and the half year of 1976. We have disallowed as avoidable the secretaries to the president and vice president in keeping with our decision as to their superiors. We have found avoidable four of the lowest paid clerks since we believe this to be a conservative estimate of the reduction in the clerical staff that will occur due to the discontinuance of passenger service. Reductions from the estimates proffered by the carrier's expert witness also occurred in general office supplies and expenses and injuries and damages categories. As to the latter, the railroad's special study used to allocate the factors common to both passenger and freight service was not submitted in evidence and cannot be verified, we have, therefore, charged as avoidable only those expenses directly assigned to passenger service.

Our figures include allowance for the fact that with the deficit passenger service operations, South Shore's Federal tax liability is less than it would be without the passenger service. South Shore ignored in its calculations of avoidable costs the fact that with discontinuance of the passenger service its net income would increase, as would its Federal taxes. In its financial analysis, South Shore estimated that the increased net income resulting from the cessation of passenger service would be taxed at 48 percent, and we have accepted that percentage in estimating the taxes that would be payable because of the discontinuance of passenger service.

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[6] The South Shore's president was not prepared to say how the railroad would operate without passenger trains. (Tr. p. 152-53.)

A benefit of the discontinuance of passenger service is that South Shore would be able to sell as salavage the copper from the catenary system, which would be completely dismantled. South Shore made some allowance for the salvage revenue by noting that the sale of copper would wipe out any undepreciated asset value of the abandoned portions of signals and interlockers, the communication system, the distribution system, and the power facilities. We do not have the information to quantify the salvage revenue but the high price of scrap makes it almost certain that the railroad will benefit considerably from the sale of its copper and steel scrap. We expect the salvage revenue to exceed substantially the undepreciated asset value of the abandoned electrical and power facilities. On the other hand, the carrier would have the one-time cost of disassembling the abandoned electrical and power facilities. South Shore has given no consideration to that expense and we have no information on which to base an estimate of the disassembly expense.

In addition to the above, our criticisms of the carrier's avoidable cost analysis are that the carrier should have described its method of direct expense assignment to passenger service, it used avoidable positions for some accounts and avoidable labor dollars for others when it should have used one method throughout as the mix could result in a double count for some wages because an avoidable position may have wages charged to two different accounts, the carrier should have shown all wages charged to positions it claimed to be avoidable, it should have separated labor and nonlabor expenses for each account, uniform procedures should have been used for each account for the three periods analyzed and it should have used actual wages for all positions claimed to be avoidable.

PUBLIC OPPOSITION

A detailed statement of the public's description of its need for service (including the views of organized labor) is shown in appendix C and we will not repeat them here. Of the more than 400 people who testified, most spoke in favor of continued service because they need it to get to and from their jobs in Chicago, because they cannot afford automobiles and the cost of driving and parking downtown, and because they would be afraid to drive into Chicago if they had cars. They believe they might have to sell their homes and relocate near a mass transit line in Illinois at substantial financial loss and they contend that the Chesapeake and Ohio has failed to keep its promise to improve service made when it sought support for its application to seek control of the South Shore in 1966, and when it said publicly between 1968 and February 1973, that it would put up the 20-percent local share ($3 million) for a capital grant from the Urban Mass Transit Administration for the purchase of 30 new passenger cars. (The grant was withdrawn on September 25, 1975, for failure of a local match.) Many people are concerned with the damage increased automobile or bus traffic will do to the environment, especially air quality, and the impact on the development of the Indiana Dunes and the National Lakeshore Park. Others wonder how an agency of the Federal Government could allow an action which would cause people to use more petroleum when this Nation's leaders are urging people to conserve fuel.

The State of Illinois favors mass transit and in 1973 it established a Government apparatus in northeastern Illinois to support it. It considers the South Shore's passenger service essential and has given the railroad financial assistance since 1969 limited to riders within Illinois. Illinois through the Northeast Illinois Regional Transit Authority (RTA) now pays 18 percent of the South Shore's operating deficits and is willing to pay 18 percent of the 20 percent required local share for Federal funds for new equipment.

The State of Indiana's position is not clear. While it is possible that the railroad's past promises to put up the $3 million local match necessary for the Urban Mass Transit Administration (UMTA) equipment grant of $10 million misled people and delayed local self-help activities the carrier's present position has been known since February 1973, and Indiana is still not prepared to act. The State of Indiana is not even prepared at this time to state that the service is needed. In November 1976, it contracted for a study that will examine transportation in the territory served by the South Shore and the study may or may not conclude that the South Shore's service is needed.[7] The Governor has stated that State funds will be available if the local communities put up their share.

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[7] See testimony of Perry J. Maull, appendix C, p. 5.

The local situation in Indiana is also unclear. The Northwestern Indiana Regional Planning Commission (NIRPC), which represents Lake and Porter counties, has to depend on the county Governments to raise funds locally. NIRPC is embroiled in a dispute with the railroad over who should sign a labor protection agreement its effectiveness in the present situation is doubtful. Of the four counties involved, only one has set up a planning authority and passed a head tax, the means set out by the Indiana legislature as the vehicle for financing mass transit. Even this county, Lake County, in which most of the people live who use the train defeated a joint resolution favoring subsidies for the South Shore on February 14, 1977.[8]

On a more positive side, St. Joseph County Council passed a resolution on January 25, 1977, pledging to negotiate an appropriate fair share support formula and State Senator Dennis P. Neary has introduced a bill, Senate Bill 368, in the Indiana Senate which would establish a commuter transportation authority for commuter rail passenger service in northwest Indiana. Based on the representations of public officials, it appears doubtful that this matter will be solved by State action. A consultant commented as recently as October 1976:

> In the absence of some guaranteed source of local revenue, the entire structure of public transit assistance fails, for the State will not contribute its portion of the non-Federal share without assurance that the local contribution will be forthcoming as well. At present, there is no assurance that it will be possible to meet subsidy needs larger than those currently being experienced.[9]

The most zealous defense of the service came from members of a concerned citizens group, Save Our South Shore, who are trying to convince individual taxpayers and elected representatives to act to save service. The group and most of the people who testified asked for more time so that action can be taken by State and local officials in Indiana.

ALTERNATIVE SERVICE

The South Shore is the only mass transit carrier operating between the Chicago metropolitan area and the other communities in northwestern Indiana served by the South Shore. Alternative transportation consists of air, rail, bus, and automobile. The South Shore contends that its users can avail themselves of adequate alternate transportation without undue inconvenience.

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[8] Minutes of the Lake County Council of February 14, 1977, Joint Resolution for South Shore-Fair Share Formula.

[9] Barton-Aschman Associates, Inc., Evanston, Ill., Northwest Indiana Transit Development Program.

Air service is available between South Bend and Chicago's O'Hare Airport via North Central Airlines, United Airlines, and Skystream Airlines. Air service between Michigan City and Chicago is provided via Phillips Airlines.

North Central and United have four flights daily to Chicago from South Bend and Skystream has five. North Central and United charge $50 per round trip and Skystream charges $30. Phillips is the only air carrier serving Michigan City and has five weekday flights to Chicago, one flight on Saturday and two on Sunday. Phillips charges $36 per round trip. Because of the prohibitive costs involved in air transportation and the additional expense incurred in traveling from O'Hare Airport to downtown Chicago, such service is not deemed to be a viable alternative to the South Shore.

An airport limousine service, provided by Tri-State Airport Limousine Service, offers service between O'Hare Airport and Hammond, Gary, Michigan City, and South Bend.

Rail service is provided by the Illinois Central Gulf (ICG), Amtrak, and Conrail. The ICG offers rail commuter service between points in eastern Illinois and Chicago. The ICG tracks are approximately 6 to 10 miles west of the Indiana State line. The most convenient stations for northern Indiana commuters would be those located at Harvey, 147th Street, 137th Street, and Kensington. The ICG offers weekly and monthly commuter trip tickets between Harvey and Randolph Street. The monthly cost for such transportation is $33.70. The ICG could be used effectively only by those commuters living in the far western portion of Lake County and even those people would have to drive or take a bus to the ICG stations.

Amtrak provides one train daily between South Bend and Chicago and four trains daily between Niles, Michigan, and Chicago. The train from South Bend to Chicago leaves South Bend at 1:25 p.m. The eastbound train to South Bend departs Chicago at 2:15 p.m. Neither the westbound nor the eastbound trains make any intermediate stops and the round trip fare is $11. The four trains between Niles and Chicago leave from Niles at 11 a.m., 12:15 p.m., 3:07 p.m., and 9:10 p.m. The round trip fare is $13.50. The South Bend-Chicago and the Niles-Chicago service do not provide a feasible alternative for South Shore commuters because there is no rush hour service and the trains make no intermediate stops.

Conrail presently offers a commuter service between Valparaiso, Gary, and Chicago which makes intermediate stops at Wheeler, Hobart, Indiana Harbor, and Whiting. This service is available primarily to Lake County commuters, however, it is almost certain the service will be discontinued in April because the Northeastern Indiana Planning Commission notified Conrail on January 4, 1977, that it would not offer the subsidy required under the Railroad Revitalization and Regulatory Reform Act to continue service after March 26, 1977.

Bus service is available through Greyhound, Trailways, Indian Trails, Indiana Motor Bus Company, and North Star.

Greyhound currently operates seven buses daily from South Bend to Chicago and eight from Chicago to South Bend. The trip takes approximately 2 hours and 5 minutes. The one-way fare is $7 and the round trip costs $13.30. There is a 10-ride commuter ticket available which costs $55.60, or $5.56 per ride. For the same trip the South Shore charges $3.10 one-way, $6.10 for the round trip, and $29.40, for the 10-ride ticket, or $2.94 per trip.

Greyhound operates one bus daily from Michigan City to Chicago and two buses from Chicago to Michigan City, one daily and one on Saturday. This trip takes approximately 1 hour and 55 minutes. The one-way fare is $5.10, the round trip is $9.70, and the 10-ride commuter ticket costs $40.80, or $4.08 per ride. In comparison, the South Shore charges $2.40 one-way, $4.70 round trip, and the 10-ride commuter ticket costs $22.50, or $2.25 a ride. Greyhound is willing to add buses from Michigan City for the displaced South Shore commuters but believes the commuter nature of the service would require Government subsidies.[10] The South Shore admitted that there is now no public transportation between Michigan City and Chicago.

Greyhound operates 13 buses from Gary to Chicago, 1 of which runs only on Fridays. Six of the westbound buses make stops at Hammond. Greyhound also operates 20 buses from Chicago to Gary, 1 on Fridays only, 1 on Saturdays only, and 2 on Sundays only. Fifteen westbound buses make stops at Hammond. The one-way fare is $2.85, round trip is $5.45, and the 10-ride commuter ticket is $22.80 or $2.28 a ride. The comparable trip aboard the South Shore would cost $1.70 one-way, $3.30 round trip, and the 10-ride commuter ticket costs $15.50 or $1.55 a ride. The Greyhound bus station in Gary is located approximately three blocks from the South Shore station.

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[10] Testimony of the Regional Director, Sales Development of Greyhound Lines, Tr. 196.

Greyhound also has seven other buses, daily, between Hammond and Chicago. The one-way fare is $2.15 and the round trip costs $4.10. Only one Greyhound bus from Gary and Hammond, arrives in downtown Chicago daily between the hours of 8:30 and 9 a.m. There are no buses from Michigan City or South Bend which arrive at a comparable time which is suitable for commuters.

Continental Trailways has three buses, daily, between Hammond and Chicago and four buses, daily, serving Gary, Hammond, and Chicago. Only one bus, which leaves Gary at 7:15 a.m., and Hammond at 7:35 a.m. and arrives in Chicago at 8:10 a.m., is suitable for commuters.

Indian Trails has one bus, daily, from South Bend to Chicago arriving at 5:15 p.m.; one bus, daily, from Michigan City to Chicago arriving at 11:50 a.m.; three buses, daily, from Gary to Chicago arriving at 2:40 a.m., 11:50 a.m., and 7:45 p.m.; and, one bus, daily, from Hammond to Chicago arriving at 2:15 p.m. In addition, Indian Trails has four westbound buses, daily, from Chicago to Hammond-Gary-South Bend, South Bend, and Gary. The Indian Trails schedules are not designed for commuter traffic and there is no indication that the existing schedules will be altered.

The Indiana Motor Bus Company (IMB) has six daily buses serving Gary, Hammond, and Chicago. The buses arrive in Chicago at 2:30 p.m., 11:10 p.m., and 11:35 p.m., and depart Chicago at 3 p.m., 3:25 p.m., and 9:45 a.m. Because of the late arrivals and early departures, the IMB does not offer a service suitable for commuters.

North Star has one bus daily from South Bend to Chicago arriving at 5:15 p.m., and two westbound buses, daily, one from Chicago to South Bend and one from Chicago to Gary. North Star currently provides no commuter service.

The Chicago and Calumet District Transit Co. provides commuter bus service between Munster, Highland, Hammond, East Chicago, and the Chicago business district. The South Suburban Safeway Lines operates exclusively within Illinois and stops across the street from the South Shore Hegewisch station. According to one witness, the 12 South Suburban buses leaving Hegewisch mornings during the workweek are filled to capacity now. Other stops are located approximately 2 miles from the South Shore's East Chicago station and 1 mile from the Hammond station. The South Suburban could be utilized by commuters living in Griffith, Highland, Munster, and Hammond only by driving to the South Suburban stops in Illinois.

The highway system serving the region is extensive. Major highways in northwest Indiana available to Chicago commuters are the Indiana Toll Road and Interstate 94. The Indiana Toll Road (Interstate 90) parallels the South Shore line in Indiana and becomes the Chicago Skyway in Illinois where it merges with the Dan Ryan Expressway south of 63d Street. Interstate 94 (The Borman Expressway), parallels the South Shore from Michigan City to Chicago and also connects with the Dan Ryan Expressway in Chicago. In addition, the area is served by U.S. Highway 12, U.S. Highway 20, and U.S. Highway 30.

ENVIRONMENTAL CONSIDERATIONS

In situations like this where our decision constitutes a major Federal action significantly affecting the quality of the human environment, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321, *et seq.*, requires that we prepare a statement detailing the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented and that this statement accompany the proposed action through each important stage of the agency's decisionmaking process.

We have fulfilled these NEPA requirements even though we have had only 4 months in which to act. Some parties contend that the NEPA eliminates the 4-month requirement and that we should have held additional hearing on environmental issues. This legal argument does not recognize that NEPA did not amend section 13a and if we did not issue a decision by April 8, 1977, the railroad could discontinue service. The Draft Environmental Impact Statement prepared by our Section of Energy and Environment and issued January 7, was the subject of considerable comment at the public hearings[11] and the public had 30 days to comment on the draft to our environmental staff. The staff-prepared final Environmental Impact Statement, distributed on March 7, dealt with the critical comments and has been available to us since the last week in February when it was delivered to the printer. We note that the staff has revised substantially the air quality section of the final statement from that contained in the draft and that much of the new analysis is attributed to the comments received and to a February 1977 report prepared by the Chicago Area Transportation Study (C.A.T.S.). The parties and public have not had time to comment on the C.A.T.S. study and in reaching our conclusions here, we have not accepted as fact any of this material.

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[11] See in particular the comments in appendix C made by the United States Environmental Protection Agency (p. 47), the Chicago Lung Association (p. 49), the Northeastern Illinois Planning Commission (p. 46), the Northwestern Indiana Regional Planning Commission (p. 33), and Hyde Park-Kenwood Community Conference (p. 58).

In a decision involving a proposal to discontinue certain South Shore trains in 1972 we found that total or substantial discontinuance of service would have a detrimental impact upon the environment. *Chicago, S. S. & S. B. R. Restructuring of Pass. Serv.*, 342 I.C.C. 154, 196. We make the same finding here. The evidence shows that if train service is discontinued, some 6,000 people, most of them 5-day-a-week commuters, will have to find a new way to travel. Based on a survey of South Shore passengers, our environmental staff posited that the worst diversion would be that some 75 percent of these people will substitute 2,000 private automobiles for train service. The figure is not certain but it is reasonable to assume based on the evidence that many of the 6,000 weekday riders are going to have second thoughts about moving or giving up their jobs in Chicago when only a few, less desirable jobs are available in northwest Indiana. With no alternative mass transit available, except across the State line in Illinois, Many more cars will be driven on the highways in the direction of Chicago. Greater vehicle miles means added amounts of carbon monoxide and photochemical oxidants one of which is ozone in an area which already has severe air pollution problems.[12]

Other environmental considerations include traffic congestion, increase in petroleum consumption, substitution of a critical fuel for noncritical ones, affect on a neighborhood designated as a National Historic Landmark District and future plans for the Indiana Dunes National Lakeshore Park. On the latter point, we note material submitted on behalf of Save the Dunes Council shows a rail line belonging to the Indiana Harbor Belt Railroad running parallel to the South Shore within the park. Nothing has been said about this line as an alternative to the South Shore or whether it is even in place today.[13] The park spokesman said there was no money in the park's present budget for a rail subsidy but if the park considers the service vital to its development this would seem to be a possibility park officials should consider.

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[12] See statements cited in preceding footnote.

[13] Exhibit no. 52.

REBUTTAL EVIDENCE

In rebuttal, South Shore introduced evidence from a consultant who selected 36 random days in 1976, except August, and reviewed for these days the section entitled Memorandum of Extraordinary Occurrences from the South Shore's Master Train Sheets recorded by the dispatcher.

On these 36 days, South Shore operated 1,224 passenger trains. Some 239 trains or 19.5 percent were late, meaning more than 5 minutes behind schedule, in arriving at their destination. Over 45 percent of the delays were attributed to the Illinois Central Gulf. Most of them occurred when South Shore trains were approaching or were within the Illinois Central Gulf terminal area between the Kensington Interlock plant and Randolph Street. South Shore freight trains accounted for 8 percent of the delays.

The railroad noted that the design of the electrical rotating equipment on its passenger equipment permits the entry of snow which causes the equipment to ground out. Out of the fleet of 49 passenger cars, 38 are needed to provide service 5 days a week. On January 21, 1977, 19 cars were out of service so that the carrier was 8 short of the required number and 13 of the cars in operation had only two, rather than four, working motors. Since November 1976, the railroad has replaced approximately 50 traction motors and on January 21, some 36 motors were in the shop for repair. As to the criticism by some that it has failed to advertise service, it noted that the problem for the last few years has been to keep sufficient equipment running to serve the number of passengers who seek service.

The South Shore stated that it tries to keep the public informed of train delays by using radio announcement and its personnel. It set out the times at which its stations are open for the sale of tickets and when the public has access to them. See appendix E. The railroad employs two people at Chicago and six at Michigan City to clean cars. In reference to a listing by the Northwest Indiana Regional Planning Commission that it was to receive $60,000 as part of the Federal share of a $75,000 program for a new rolling stock communication system, it said it completed the work in January 1976, at a cost of approximately $90,000 all of which was paid for by the South Shore. It also stated that it did not receive any money for sale of its right-of-way to the Indiana Toll Road or to the State of Indiana. Rather, it made its right-of-way, roughly from the west city limits of Gary to Calumet Avenue in Hammond, available to the Toll Road and paid it $850,000 in cash. In return, it received a new right-of-way approximately 36 feet wide on which it had to pay to construct a double track railroad from subgrade on up. It stressed that the public knows only about the old cars and is not aware of the improvements it has made in the well-lighted parking areas, the installation of welded rail, electric switch heaters and automatic flashers and crossing gates at grade crossings.

POSITION ON BRIEF

We received briefs from the railroad, the State of Indiana, the Indiana Office of Public Counselor, the city of Chicago, the Northwestern Indiana Regional Planning Commission, the Railway Labor Executives' Association (RLEA), four unions affiliated with RLEA,[14] and the National Association of Railroad Passengers. A joint brief was filed on behalf of the Illinois Commerce Commission, State of Illinois, the Northwestern Indiana Regional Planning Commission, the United Transportation Union and the Brotherhood of Railway and Airline Clerks.

The South Shore's position is that passenger losses from 1971 through September 1976, totaled $10.7 million and that it cannot be expected to absorb continuing losses in the face of declining usage and the repeated refusal of Indiana public authorities to provide any financial support for the unprofitable service. The railroad contends that during the past 25 1/2 years freight revenues have generated a profit of $29.7 million but passenger deficits have consumed a total of $19.4 million, leaving a small profit averaging about $250,000 per year after income taxes for a return on investment of less than 2 percent.

Rather than contend that it is "better" for its riders to employ alternate modes of transport, the South Shore argues only that those who do ride its trains fail and have failed for nearly a quarter of a century to pay the true cost of the service they utilize. It points out that section 701(a)(6) the Railroad Revitalization and Regulatory

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[14] International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; the International Brotherhood of Firemen and Oilers; the Brotherhood of Railway Carmen of the United States and Canada and the International Brotherhood of Electrical Workers.

Reform Act of 1976 (Public Law 94-210, 94th Cong. February 5, 1976) prohibits "cross-subsidization among intercity, commuter, or rail freight services" and asserts that by this Congress has manifest its clear intent that the cross-subsidy of losing services by profitable ones should no longer be required. Moreover, it does not think that the coal traffic, which is the dominant portion of its freight business, will continue to increase.

The South Shore contends that Congress enacted section 13a to avoid a requirement that other services subsidize a deficit passenger operation and that subsidization must be avoided except in extreme cases *Southern Ry. Co.* v. *North Carolina*, 376 U.S. 93, 100-02 and 105 (1964). It rejects arguments that it should be required to continue to absorb the losses because of its recent overall profitability. *Southern Railway Co. Changes in Train Service*, 348 I.C.C. 225 at 249; *Great Northern Ry. Co. Discontinuance of Service*, 307 I.C.C. 59, 70 (1959); *Chicago, B. & Q. R. Co. Discontinuance of Trains*, 330 I.C.C. 411, 421 (1967); and *Soo Line R. Co. Discontinuance of Trains*, 328 I.C.C. 610, 620 (1967). It points out that while on some occasions the courts have held that common carriers may be compelled to continue an unprofitable service in the face of a demonstrated and substantial public need, the courts have also concluded that, where the public need is not substantial and the losses being sustained are large, an order requiring continuation of the service was confiscatory, and, hence, unconstitutional. See, *e.g.*, *Mississippi Railroad Commn* v. *Mobile & O. R. R.*, 244 U.S. 388 (1917); *Chicago, B. & Q. R. R.* v. *The Board of Comm'rs*, 78 F. Supp. 1010 (E.D. Mont. 1947); and *Atlanta Coastline R. R.* v. *Public Service Commission*, 77 F. Supp. 675 (D.S.C. 1948).

The railroad does not dispute the sincerity of the 400 people who testified in favor of keeping service but believes that for all but a handful of the population, the South Shore has little or no usefulness. It calculates that using 1970 census population figures only 0.38 percent of the people in the Gary, Hammond, East Chicago area, 0.27 percent of the people in La Porte County, and 0.025 percent of the people in St. Joseph County ride the train. It believes the communities it serves are all located within a well-developed auto, bus, rail, and air transportation network and thus there is adequate alternative transportation and that any net increase in air pollution, which might occur if the discontinuance is authorized, will be slight in comparison with the total contribution to air pollution being made by existing automobile traffic in the South Shore corridor.

The South Shore contends that the approach taken by the State of Indiana and by the local jurisdictions served by the South Shore reinforces the conclusion that the carrier's passenger service has only marginal importance to the region as a whole. The carrier's financial problems and its need for new equipment have been recognized since before 1969 but no pragmatic scheme has been put forward to provide the necessary funding. The carrier states that the problem with obtaining UMTA funds has been in obtaining the required non-Federal match, the burden of which Indiana has shifted to the localities or alternatively to the carrier. In its opinion, Indiana has created a Byzantine complex of mechanisms ostensibily designed to benefit regional transit.

The South Shore notes that the Commission is without authority to impose conditions for the protection of employees in train discontinuance proceedings. *Great Northern Ry. Co. Discontinuance of Service*, 307 I.C.C. 59; *Missouri Pac. R. Co. Discontinuance of Passenger Service*, 312 I.C.C 105; *Soo Line R. Co. Discontinuance of Trains*, 328 I.C.C. 610; and *Southern Railway Company Discontinuance of Trains* 5 and 6, F.D. No. 28207,and that it has imposed such protective conditions in abandonment cases *Chicago, B. & Q. R. Co. Abandonment*, 257 I.C.C. 700, for the benefit of those directly affected by the abandonment per se *Baltimore & O. R. Co. Discontinuance of Service*, 317 I.C.C. 509 and *Soo Line R. Co. Discontinuance*, 327 I.C.C. 51. It contends there is no evidence here that anyone would be adversely affected by the abandonment so that the Commission should not impose labor protective conditions. *Chicago Great Western Ry. Co. Discontinuance of Trains*, 328 I.C.C. 664, 677-8.

The State of Indiana, acting through the Public Service Commission, requests that the Commission order the South Shore to continue passenger service for 1 year so that State and local Governments can devise a plan to provide the necessary commuter service in northwest Indiana. The Northwest Indiana Corridor Study is examining the following alternatives, (1) no rail service, (2) a reduction in passenger service on the South Shore, assuming that necessary capital improvements are made, (3) continued service on the entire South Shore, assuming capital improvements are made, and (4) extending the South Shore to the proposed multimodel terminal to the St. Joseph County Airport west of South Bend. The study will be completed June 30, 1977, and will recommend the appropriate transportation needed in the corridor. Indiana urges that there is a strong need for continuing the South Shore another year and that the total cost to society for keeping the rail service for 1 year is less than the cost of discontinuing the service. Indiana states that the State and affected local Governments are working diligently to find a solution to the problem.

The Indiana Office of Public Counselor (office) contends that public support for the South Shore goes back to 1968 when the railroad and the Northwest Indiana Regional Planning Commission jointly prepared a capital grant application to the Urban Mass Transportation Administration. It claims the railroad does not have clean hands because it reneged on its promise to provide the local match for this grant. It is critical of the railroad for cutting short the time it was going to give the public sector to act before it filed for discontinuance and claims the railroad has contributed significantly to its problem. As a summary of the reasons against discontinuance, the Office lists the following: (1) That there is no reasonable alternative to the South Shore service, (2) that the discontinuance would deteriorate already critical air quality, (3) that energy resources will be depleted prematurely, (4) that the development of the Michiana Regional Airport, the Gary Municipal Airport, and the Indiana Dunes National Lakeshore Park would be adversely affected, (5) that the employment of many commuters and the economy of the entire area would be affected, (6) that the public safety would be jeopardized by adding 3,500 automobiles to the presently overcrowded highways, and (7) that in the event of a national emergency, such as an oil embargo, the South Shore would provide an invaluable benefit to the area. It contends that it would be unconscionable to allow the South Shore and the Chessie System to accept the benefits of the profitable freight traffic and reject the burdens of the passenger service and its related duties to the public. This is especially true where the carrier can withstand the alleged passenger deficits. Citing *Southern Railway Co.* v. *North Carolina,* 376 U.S. 93, 105 (1964); *Norfolk and Western Railway Company* v. *United States,* 316 F. Supp. 1396 (1970); and *In Re Erie Lackawanna Ry. Co.,* 517 F. 2d 893, 898-99 (6th Cir. 1975).

Speaking for the Governor, the Office asks this Commission to require the railroad to continue the service for at least a year from April 1977 in order to allow the State and local communities to complete the technical studies necessary to meet the planning requirements for capital assistance from UMTA, to determine the transportation service appropriate to the corridor, to arrange for financing, to replace equipment and to determine the appropriate scope and manner of operating assistance. The Governor believes a commitment is emerging to find a solution to the problems and he requests additional time in order to put a financial package together.

The city of Chicago states that the factors which the Commission must consider in a discontinuance case now include, the population of the communities served, the use by the public of the service sought to be discontinued, the availability and adequacy of alternative transportation services in the affected areas, the general financial condition of the carrier, the losses suffered by the carrier in providing the service, and the impact upon the quality of the human environment, energy conservation and the economy of the areas served.

The city contends that the South Shore's avoidable cost studies are inflated. It claims that the carrier's figures for maintenance of way and structures ($505,285) and depreciation ($29,088) are not savable expenses; that the labor portion of the maintenance of equipment accounts should be rejected because of a lack of evidence that the employees will be discharged, and that the overhead expenses reflected in the maintenance of equipment accounts are not savable. The city wants the traffic expenses in the amount of $45,640, disallowed, it claims that general and miscellaneous expenses have not been recognized as avoidable, that trackage rights of $497,518 are not savable and that certain labor expenses are suspect. It urges the carrier to renegotiate its electrical supply contract to obtain reduced electrical rates. It says the railroad has failed in its affirmative duty to reduce costs and increase revenue.

On the issue of public convenience and necessity, the city says it has never participated in a train-off case in which there has been such an overwhelming showing of public need as exists in this record. It cites *Southern Railroad Company* v. *North Carolina,* 376 U.S. 93, 105 (1963), as the lead case on the subject, and says this case requires consideration of the systemwide profits of the South Shore and the Chessie System. It contends: (1) That service is an economic necessity for its riders and that this many people cannot be shifted to other modes of transportation without severe hardship to people, the environment, the economy and energy conservation, (2) without service many riders would have to seek employment in economically depressed northwest Indiana or would have to move,

(3) ridership has decreased in recent years partly as a result of poor service, a lack of advertising, the restructuring of service and the 1970 fare increase, however, in consdering the future public convenience and necessity it is obvious that new equipment, park development, and improvement of the economy will stimulate traffic.

Other factors which pertain to public convenience and necessity are the impact on railroad employees should the South Shore service be discontinued, *Soo Line R. Co. Discontinuance*, 327 I.C.C. 50, 64, and *Chicago, R. I. & P. R. Co. Discontinuance of Trains*, 328 I.C.C. 278, 296; the last train doctrine, *Texas & P. Ry. Co. Discontinuance of Trains*, 336 I.C.C. 123, 140; *Kansas City S. Ry. Co. and Louisiana & A. Ry. Co.*, 334 I.C.C. 807, 822; *Chicago & E. Ill. R. Co. Discontinuance of Trains*, 333 I.C.C. 626; *Southern Pac. Co. Discontinuance of Trains*, 333 I.C.C. 525, 557; *Norfolk & W. Ry. Co. Discontinuance of Trains*, 334 I.C.C. 1, 20; and *Norfolk & W. Ry. Co. Discontinuance of Trains*, 334 I.C.C. 506, 522, and the availability and adequacy of alternative transportation in the areas affected *Soo Line R. Co. Discontinuance of the Trains*, 320 I.C.C. 337, 354. On the last point, the city thinks it is a fact that the South Shore provides the only reliable commuter service from northwestern Indiana to Chicago. Airline service between South Bend and Chicago is prohibitive in cost to most South Shore's riders, the Amtrak and Conrail service at Valparaiso and Gary are not of a commuter nature (it notes that Conrail has filed its notice to discontinue its rail passenger service), and the Hammond Bus Service is limited and could not possible absorb the South Shore riders from Gary, Hammond, and East Chicago. It considers the suggestion that South Shore riders who reside east of South Bend drive private automobiles to the CTA "Dan Ryan" stations at 95th and 87th Streets frivolous since the driving distances are from 15 to 45 miles and there is no available parking at or near either station.

The city stresses that as a nonpolluting mass transit service the South Shore is harmonious with maintenance of a healthy environment. It notes a local ordinance freezing construction of parking facilities in downtown Chicago and quotes testimony of city and RTA officials favoring retention of the South Shore and the fact that the Illinois Regional Transportation Authority is providing an 18-percent operating subsidy.

In addition to its participation in a joint brief, the Northwest Indiana Regional Planning Commission (NIRPC), also submitted one on its own. In assessing the public convenience and necessity

NIRPC contends: (1) The South Shore provides critical commuter service citing ***Chicago S. S. & S. B. Restructuring of Pass. Serv.***, 342 I.C.C. 154 (1972), (2) automobiles are not common carriers and cannot be considered as an alternative in a section 13a proceeding, (3) for all practical purposes the South Shore is the last train serving this area, ***Chicago & Eastern Illinois Railroad*** v. ***U.S.***, 308 F. Supp. 645 (1969, (4) the nonrail alternatives are impractical, (5) over 100 handicapped people use the South Shore each day, (6) the South Shore is a regional institution, (7) that the Commission should consider lower real estate values, disruption of tax structure, increased highway hazards and business losses, and (8) the critical impact of discontinuance on employment, ***Soo Line R. Co. Discontinuance***, 327 I.C.C. 50, 74 (1966) and ***Chicago, R. I. & P. R. Co. Discontinuance, of Trains***, 328 I.C.C. 278, 296 (1966). On the issue of the burden to interstate commerce, NIRPC states that the carrier must do more than just state its losses and finds the South Shore's presentation unpersuasive. It contends that the South Shore's assertions that it has made every diligent effort to get public support inaccurate and irrelevant.

On the question of the evironment, NIRPC says one might fairly assume that because the NEPA occurred after passage of section 13a of the Interstate Commerce Act, Congress intended that NEPA should supercede section 13a's 4-month time restriction. It would have the Commission deny the petition because there has been insufficient time available for environmental considerations and noncompliance with the spirit and letter of ***Harlem Valley Transportation***, 500 F. 2d 336.

The Railway Labor Executives' Association contends that the labor protective agreements developed under section 13(c) of the Urban Mass Transportation Act of 1964 (UMTA) have become relatively standard in their important provisions over the years. It thinks it is obvious that the South Shore is not interest in securing UMTA fund and has sought to stall execution of a standard section 13(c) agreement in the hope that it can eliminate its rail passenger service prior to the receipt of such funds thereby increasing its already high net profit. It urges the Commission not to let the South Shore benefit from its refusal to execute a standard section 13(c) agreement.

The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Foregers and Helpers; the International Brotherhood of Railway Carmen of the United States and Canada;

and the International Brotherhood of Electrical Workers contend that in December 1975, the South Shore through the Northwestern Regional Planning Commission (NIRPC) submitted an application under section 5 of the Urban Mass Transportation Act of 1964. Funds matching the Federal aid would come from the Indiana Division of Public Transportation, nonfare box revenues of the South Shore and from the Illinois Regional Transportation Authority. The established practice under section 13(c) of the Urban Mass Transportation Act of 1964 is that the railroad carrier furnishing the service or the State or local transit authority negotiate and execute an employee-protective arrangement, a section 13(c) agreement, which must be certified by the Secretary of Labor before the Department of Transportation will release funds. A representative of these unions mailed a letter to the executive director of NIRPC on June 21, 1976, containing a basic, boiler plate section 13(c) agreement but NIRPC never responded. On December 27, 1976, the union representative sent a letter explaining what had happened to the South Shore because the Department of Labor will accept execution by either the carrier or public transit authority. As of February 23, 1977, it had received no response. In summary, it is the unions' position that substantial Federal funds were available for South Shore's operating expenses if NIRPC or the South Shore decided to meet the minimal statutory requirements.

The National Association of Railroad Passengers (NARP), sees the critical issue as whether the alleged undue burden on interstate commerce is sufficiently heavy so as to override the obvious public convenience and necessity. It believes circumstances bar discontinuance noting the railroad's failure to sign a section 13(c) agreement so as to receive Federal subsidy. It claims this shows bad faith and that the Commission has indicated in numerous cases under section 13a a showing of undue burden may be negated by the carrier's bad faith.

It contends that the existing service is vital to thousands of commuters, that national parks across the country are facing major problems from the ever-increasing volume of motor traffic and the South Shore would avoid this in the case of the Indiana Dunes National Lakeshore Park, that the discontinuance would result in the added use of dwindling energy resources, that the Chessie System bought the South Shore with full knowledge that it had a passenger operation of doubtful profitability and should not be allowed to skim the cream without swallowing the curd, a logical objective for any clever kitten.

In their joint brief, the Illinois Commerce Commission, the State of Illinois, the Northwestern Indiana Regional Planning Commission, the United Transportation Union and the Brotherhood of Railway & Airline Clerks contend that this Commission has not afforded them a full and fair hearing and request that the discontinuance notice be rejected as an attempt to avoid the Commission's abandonment jurisdiction. They claim that Indiana's willingness to subsidize the service, if it is shown to be operating at a loss, is not an issue because the South Shore and the Chessie are very prosperous and that this Commission need not act on the carrier's discontinuance notice within 4 months. They believe that the level of patronage places the proceeding outside section 13a(1) because Congress intended that there be significant decline in patronage and that public testimony shows that the trains are a real necessity and that the adverse effect on labor would be tremendous. They cite *Southern R. Co.* v. *North Carolina,* 376 U.S. 93, 105 (1964), for the proposition that since this is a vital commuter operation in a large metropolitan area the Commission should require the carrier to sustain large operating deficits and *Chicago, South Shore & S. B. R. Discontinuance of Service,* 213 I.C.C. 655, 662 (1961), and *Chicago, South Shore & S. B. R. Discontinuance of Service,* 320 I.C.C. 440, 456 (1964), for the proposition that the adverse effect upon employees is a factor to be considered by the Commission in determining whether public convenience and necessity permit discontinuance. They state that there is no rule of law that says a railroad's freight service may not assist passenger service. They contend that the carrier's avoidable cost studies appear greatly inflated and should be rejected. They see the deficits as very small and pale in insignificance when measured against the strong showing of public convenience and necessity. If the Commission authorizes termination of the service, employee protective conditions should be prescribed. They note that the discontinuance is part of the abandonment and the Commission's practice is to impose protective conditions where trackage rights are involved.

DISCUSSION AND CONCLUSIONS

The threshold issue is jurisdiction. Several parties contend that one of the trains to be discontinued, "Train No. 5," is intrastate and that the notice requirements of section 13a(2) which apply to intrastate trains have not been complied with. We think this argument promotes form over substance.

The record shows that the South Shore's first-morning train to Chicago originates in Michigan City as train No. 5, proceeds east to South Bend, and then, after a short stop, the equipment and crew, proceed west to Chicago. Passengers wishing to ride the South Shore to Chicago may board at Chain O'Lakes, Smith, Tee Lake, La Lumiere, and Springville—all points between Michigan City and South Bend—and, according to the schedule, can entrain only on the eastbound segment of the run to South Bend. Upon reaching South Bend, the equipment, crew, and passengers change direction and proceed to Chicago. To facilitate understanding of the public time table, each segment of the run has been given a different number. The Michigan City-South Bend portion is listed as train No. 5, the remainder of the run from South Bend to Chicago appears on train No. 62. Train No. 5 thus is in fact an equipment move for train No. 62 from South Bend to Chicago, and therefore a portion of an interstate movement.

In *Missouri Pac. R. Co. Discontinuance of Trains,* 320 I.C.C. 383, 386 (1964) the Commission stated:

> Where, as here, the trains physically operate from a point in one State to a point in another, and equipment and passengers thereon move from one State to a point in another without change of train at an intermediate point, the trains in question are interstate trains ***.

We conclude, therefore, that train No. 5 comes within the purview of our jurisdiction under section 13a(1). See *New Jersey* v. *New York, S. & W. R.,* 372 U.S. 1, 4n. 1 (1963); and *United States* v. *City of Chicago,* 400 U.S. 8, 10.

Turning to the merits, as we stated recently in *Southern Ry. Co.—Discontinuance of Trains,* 348 I.C.C. 716 (1976), it is well settled that in a proceeding under section 13a(1) we must determine whether continued operation is required by public convenience and necessity and whether such continued operation will not unduly burden interstate commerce. In making this decision several factors are weighed, no one of which is dispositive. In *Atchison, T. & S. F. Ry. Co. Discontinuance of Trains,* 334 I.C.C. 735, 745 (1969), the Commission stated:

> The fundamental question for resolution in proceedings under section 13a(1) *** is "*** what effect the discontinuance of the specific train or service in question will have upon the public convenience and necessity and upon interstate operations or

> commerce." ***Southern R. Co.*** v. ***North Carolina***, 376 U.S. 93, 104 (1964). Among the factors this Commission considers in making such a determination are the population of the territory serviced, the use by the public of the service sought to be discontinued, other available transportation in the area, the general financial condition of the carrier involved, and the losses it suffers in providing the service. No one factor is, standing alone, dispositive. Thus, the fact that these trains are operating at a deficit is significant. By the same token, public use of, and reliance upon, this rail service, is also an important consideration. ***Missouri Pac. R. Co. Discontinuance of Passenger Trains***, 320 I.C.C. 1. The short of the matter is: we must balance public convenience and necessity against undue burdens on interstate commerce. Cf. ***Southern Pac. Co. Discontinuance of Trains***, 334 I.C.C. 159, and ***Colorado*** v. ***United States***, 271 U.S. 153 (1926).

The Commission also must consider what impact, if any, the proposed discontinuance would have upon the environment, ***Harlem Valley Transportation Assn*** v. ***Stafford***, 360 F. Supp. 1057 (S.D. N.Y. 1973), affirmed 500 F. 2d 328 (2d. Cir. 1974), and the probable effects upon employees, ***Great Northern Ry. Co. Discontinuance of Service***, 307 I.C.C. 59, 74 (1959).

Because the South Shore operates the last commuter service in a large and heavily industrialized metropolitan area, any cessation of service will be subject to the strictest scrutiny. See ***Southern R. Co.*** v. ***North Carolina***, 376 U.S. 93, 105 (1963). Another newer factor to be weighed is the importance which the involved States accord to the service as demonstrated by their activities in applying for available Federal subsidies for mass transit. Speaking generally, commuter rail service has been a deficit producing operation for many years. Many State and regional agencies, such as the Commuter Operating Agency of New Jersey, the Southeastern Pennsylvania Transportation Authority, the Massachusetts Bay Transportation Authority, as well as the Illinois Regional Transportation Authority are providing subsidies to the railroads in order to offset revenue losses incurred from commuter operations. The Congress passed legislation to assist mass transit in 1964 and by amendments in 1970 and 1974 has enlarged the involvement and financial assistance of the Federal Government.

The South Shore is used by approximately 6,000 daily commuters to get to their jobs in Chicago. Without this service these passengers would have no comparable means of mass transit available. While the number of people using the train is substantially smaller than the numbers using the other commuter lines serving downtown Chicago, the present riders must be considered as the "hard core" users in view of the less than desirable conditions on the South Shore.

It is obvious on this record that the Chicago job market is necessary for the continued economic survival of many people in northwestern Indiana and that these people need the South Shore to continue their way of life. With discontinuance, passengers from western Lake County could possibly use the Illinois Central Gulf, the Chicago and Calumet District Transit Co., or the South Suburban Safeway Lines, but their use of these alternative modes of transportation would involve some degree of hardship because of the location of the bus stops and the distance to the ICG stations. In addition, the buses are presently overcrowded and are considerably slower than the South Shore. For commuters located east of Gary, the only alternative would be the private automobile. The automobile is not a common carrier and merits little consideration as an alternative service. *Atchison, T. & S. F. Ry. Co. Discontinuance of Trains*, 333 I.C.C. 497 (1968).

We have great concern regarding the adverse environmental impacts, especially to the area's air quality, which might result from a discontinuance of this operation. The area along the south rim of Lake Michigan is highly industrialized. While some success has been achieved in recent years to improve air quality, we think any action which will worsen conditions in this area should be avoided if possible. We note the statements of concern by the United States Environmental Protection Agency. In short, we think that discontinuance would have an adverse impact on the environment, although the degree may not be quantifiable.

We are also concerned with the continued financial health of the South Shore. After a careful examination of the railroad's figures we have found that the South Shore is losing heavily on its passenger service. (As noted previously in this report, almost no railroad in the United States is performing commuter rail service at a profit.) The South Shore is profitable overall, in part due to its affiliation with the Chesapeake & Ohio Railroad. While many people believe that the Chesapeake & Ohio has "taken advantage" of the South Shore, we do not think this is the case. The South Shore railroad was in financial difficulties for many years before it was taken over by the Chesapeake and Ohio. In *Chesapeake & O. Ry. Co.—Control—Chicago, S. S. & S. B. R.*, 330 I.C.C. 477 (1966), we noted that the South Shore had attempted since about 1960 to cure its financial and operational problems by terminating its independent status and that it made overtures to at least 12 other railroads and to principal shippers who might be interested in acquiring it. Only two railroads were interested. One of them was a similarly situated short-line railroad and affiliation with that carrier would not have satisifed the complaints of Bethlehem Steel Company which denied the South Shore permission to service its facility at Burns Harbor unless it became affiliated with major trunkline carrier. The public feels betrayed because Chesapeake & Ohio officials stated in 1966 that they would continue the passenger operations and because between 1966 and February 1973, officials of the South Shore stated unequivocally that the Chesapeake & Ohio would stand behind the South Shore's payment of the 20-percent local match for a urban mass transit grant for new cars. Neither of these promises has been kept. It is quite likely true that the Chesapeake & Ohio paid a lower price for the South Shore's stock because of the passenger losses. Yet this does not change the fact that the Chesapeake & Ohio was the only major carrier interested in acquiring control of the South Shore and that this control was needed by the South Shore to continue in existence. As noted in our financial analysis of the overall South Shore structure, while it appears sound at this date, we have some reservations since the carrier's rather substantial increase in profitability over the last few years appears to have slowed down. While we find the South Shore is able to sustain these losses now, we do not know how long this situation will continue. In any event, without new equipment and a firm commitment by the State of Indiana and the local communities for a continuation of the service and the financial backing that entails, the problem of the South Shore will continue.

In brief many of the participants have cited numerous Commission cases for discussion of the various elements to be considered in a passenger continuance proceeding. One element not previously considered in any of these cases is the existence of the Federal policy on mass transit. This policy is reflected in the Urban Mass Transportation Assistance Act of 1964, as amended in 1970 and later in 1974. In this statute Congress found that Federal financial assistance for the development of efficient and coordinated mass transportation systems is essential to the solution of urban problems. As administered by the Federal Mass Transit Administration which is part of the Department of Transportation, the Federal Government can provide 80 percent of the cost of new equipment and other capital items and 50 percent of the railroad's operating deficits. Under the statutue, the difference is to be made up either by the State or local communities involved. The carrier cannot be expected to supply these funds, nor did have that as its intention when it passed the legislation. The problem before us is a problem for the States of Indiana and Illinois. The State of Illinois has made its position clear but the State of Indiana has not, even though most of the people who will be affected are residents of that State. We recognize the high level of concern of many people in northwest Indiana and their attempts to get action from their elected representatives. Because we are convinced that South Shore's service should be continued if at all possible, we will order the railroad to continue the operation of service for 10 months from the date of service of our order. We expect that this will be sufficient time for the State of Indiana to take steps to save the service. If this does not occur, we think it highly likely that there is no future for the South Shore's passenger operations. We find, therefore, that the operation by the Chicago, South Shore and South Bend Railroad of passenger trains over its line is required by the public convenience and necessity and that continued operation for a period of 10 months from the date thereof will not constitute an undue burden on interstate or foreign commerce.

With regard to the application for abandonment of trackage rights, in the case of jointly used facilities we have sometimes said that a carrier's withdrawal from jointly used facilities may not lessen the total burden on interstate commerce, but rather may simply shift it to the remaining users of the facilities or among remaining trains of the withdrawing carrier. *Chicago, R. I. & P. R. R. Co. Discontinuance of Trains*, 328 I.C.C. 278, 288 (1966). The better rule, however, is that such withdrawal is a savings, and that before concluding that such withdrawal will not lessen the burden on interstate commerce the Commission has required the remaining users to make an affirmative showing that interstate commerce will continue to be so effected. *Chicago, R. I. & P. R. R. Co. Discontinuance, supra*, at 288; *Chicago Great Western Ry. Co. Discontinuance of Trains*, 328 I.C.C. 664, 670-71 (1965); *Baltimore & O. R. Co. Discontinuance of Service*, 317 I.C.C. 509, 511 (1962). In the absence of such a showing, the Commission will not conclude that the total burden on interstate commerce remains the same after withdrawal.

In the present case, the trackage rights affected are those of the Illinois Central Gulf, which has voiced no objection as to any effect which withdrawal would have on its resources or on interstate commerce. By the abandonment, the South Shore will save $137,000 in yearly rent (excluding the first year) plus an added amount based on varying factors. We find, therefore, that upon withdrawal from these trackage rights the burden on interstate commerce will decrease.

The South Shore has characterized the abandonment as being supplemental to and incidental to the discontinuance application, and it stated that it would go on record as being interested in the abandonment at this time only if the discontinuance of service over that portion of the line is successful. As already stated, we will require that the South Shore continue its passenger operations for a further 10-month period in order to afford interested public groups and the appropriate governmental bodies sufficient time in which to develop an adequate subsidy program. Yet, as already indicated, we are aware of the difficulties involved and that continued operations by the South Shore of its commuter services for the period beyond the 10-month mandatory extension is uncertain. We are of the opinion, therefore, that the application for abandonment of the trackage rights should be granted, but on condition that the abandonment not be effected until the South Shore's passenger train operations are lawfully discontinued. In this way, we will obviate the need for a refiling of the abandonment application if adequate subsidies for the commuter operations of the carrier are not forthcoming.

Protestant labor unions have requested that labor conditions be imposed both as to the discontinuance and the abandonment. In this connection, we note that the Commission is without authority to impose conditions for the protection of employees in train discontinuance proceedings. *Southern Ry. Co.—Discontinuance of Trains, supra*; *Great Northern Ry. Co. Discontinuance of Service*, 307 I.C.C. 59; *Missouri Pac. R. Co. Discontinuance of Passenger Service*, 312 I.C.C. 105; and *Soo Line R. Co. Discontinuance of Trains*, 328 I.C.C. 610.

With regard to the abandonment, the Commission has, in appropriate cases, imposed conditions as set forth in *Chicago, B. & Q. R. Co. Abandonment*, 257 I.C.C. 700, for the benefit of those directly affected by the abandonment per se. *Baltimore & O. R. Co. Discontinuance of Service*, 317 I.C.C. 509; and *Soo Line R. Co. Discontinuance*, 327 I.C.C. 51. In the instant case, however, there is no evidence that any employee will be adversely affected by the abandonment itself, as distinguished from any future discontinuance of service. Therefore, as we did in *Chicago, Great Western Ry. Co. Discontinuance of Trains*, 328 I.C.C. 664, 677-8, we decline to impose labor conditions.

While the South Shore would be required to file another notice of discontinuance at the end of the 10-month period, this Commission has the ultimate responsibility to decide whether or not an investigation is required. One important consideration will be what the governmental authorities have done. We also wish to make it clear that the South Shore is under an obligation to negotiate in good faith to reach an agreement.[15] Any indication that this has not happened will, likewise, be considered if this Commission is required to pass on this matter again. We doubt that it would be in the interest of any party to have this matter returned to the Commission. We think that a satisfactory resolution of the problem posed by the threatened discontinuance more likely can be avoided if both sides are aware that we view the matter as one involving mutual obligations and responsibilities.

Contentions of the parties not specifically discussed herein have been considered and found to be without merit.

An appropriate order will be entered.

APPENDIX A

Decline in patronage

Year	Revenue passengers	Year	Revenue passengers
1946	6,163,798	1962	3,666,418
1947	6,069,573	1963	3,295,156
1948	5,511,209	1964	3,136,914
1949	4,765,456	1965	3,135,416
1950	4,351,592	1966	3,286,293
1951	4,313,398	1967	3,363,384
1952	4,241,277	1968	3,307,362
1953	4,306,037	1969	3,249,655
1954	4,237,194	1970	2,682,075
1955	4,440,538	1971	2,030,993
1956	4,402,266	1972	1,734,884
1957	4,294,149	1973	1,762,664
1958	3,992,798	1974	1,920,120
1959	3,947,145	1975	1,816,957
1960	3,936,942	1st 6 months of 1976	883,490
1961	3,861,941		

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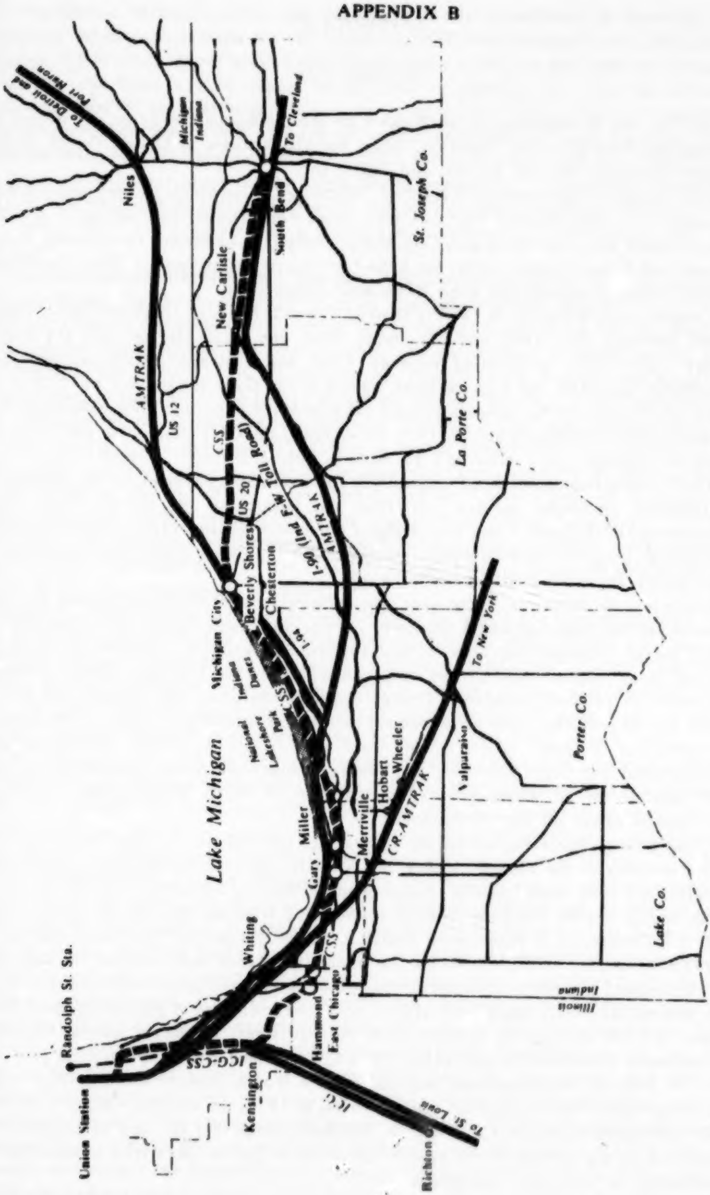
[15] The parties might find it helpful to consider "Standards for Determining Commuter Rail Service Continuation Subsidies and Emergency Operating Payments." 49 CFR 1127.

APPENDIX B


To Detroit and Port Huron
Niles
Michigan
Indiana
To Cleveland
South Bend
St. Joseph Co.
New Carlisle
AMTRAK
US 12
CSS
US 20
I-90 (Ind F-W Toll Road)
AMTRAK
La Porte Co.
Michigan City
Beverly Shores
Chesterton
I-94
To New York
Indiana Dunes
National Lakeshore Park
CSS
Lake Michigan
Porter Co.
Miller
Gary
Merriville
Hobart
Wheeler
Valparaiso
CR-AMTRAK
Whiting
CSS
Hammond
East Chicago
Lake Co.
Indiana
Illinois
Randolph St. Sta.
Union Station
ICG-CSS
Kensington
ICG
To St. Louis
Richton

APPENDIX C

Michigan City

Most of the 80 witnesses at Michigan City use the Shops station or the station in downtown Michigan City, however, many use the stations at Ogden Dunes, Dune Acres, Tremont, Beverly Shores, and Pines, Ind.

Several public representatives testified, including United States Congressman Adam Benjamin Jr., State Senator Dennis Geary, State Representatives Clifford D. Arnold and Richard Bell, and Michigan City Mayor Joseph R. LaRocco. In addition, Terry Crone and Robert Rigney spoke on behalf of United States Senator Birch Bayh and United States Congressman John Brademas, respectively.

Congressman Benjamin of the 1st District Indiana, has used the South Shore since 1940. Between June 1962 and September 1963, the Congressman used the South Shore daily while commuting between Gary and Chicago. More recently, on December 26, 1976, the Congressman waited at the Gary station, for the 5:55 p.m. train to Chicago, for 45 minutes beyond the scheduled departure time before leaving by automobile. On December 30, 1976, he waited at the Gary station, for the 7:25 a.m. train to Chicago, for 1 hour and 15 minutes before it finally arrived.

The Congressman gave three reasons why the South Shore should not be allowed to discontinue passenger service: (1) That the commuter rail service is a vital cornerstone to the growth and well being of northwest Indiana; (2) that there has been substantial progress towards public assistance for the South Shore; and (3) there is insufficient alternate public transportation.

Congressman Benjamin stated that approximately 4,000 daily commuters use the present service, many of whom are lower income wage earners who must commute to the Chicago metropolitan area to find suitable employment. Without the present service these people would be left with no alternate public transportation and would be unable to relocate because of limited financial resources. He expects that added noise and air pollution from the necessary increase in automobile usage would damage northwestern Indiana. Similarly, he fears that if the passenger operations are discontinued, the South Shore will remove its catenary and power distribution system and become an all diesel-powered freight carrier which would cause a further detrimental effect on the environment.

Congressman Benjamin served for 10 years in the Indiana General Assembly and was a member of the Senate Finance and State Budge Committees. He believes that progress has been made towards obtaining public funding but added a caveat that such funds would not be available without cooperation from the carrier. He pointed out that UMTA section 5 funds were available to the carrier for the fiscal year 1975 ($383,978) and 1976 ($356,680) but he understands they were refused because the carrier refused to enter a labor agreement which is a condition precedent to obtaining the moneys. Section 5 funds are available only for the current or preceding fiscal year. Also, in 1968 the carrier together with the Northwest Indiana Regional Planning Commission submitted an application for a $10 million capital improvement grant to UMTA with the understanding that the carrier would provide the one-third local matching funds. When the grant was approved in 1971, the company did not finance the local matching funds. Congressman Benjamin states that the lack of cooperation exhibited by the carrier in the past is indicative of the carrier's lack of sincerity in continuing its passenger operations.

Congressman Benjamin stated that regardless of past experiences in obtaining the matching funds there is hope for the future. In 1974, the Indiana General Assembly created the Mass Transportation Study Commission to review the problems of mass transit in the State and to advise on methods of funding. In 1975, the General Assembly enacted laws allowing counties to create Public Transportation Authorities and finance their operations through an employee-employer head tax. The 1975 General Assembly also authorized $2.5 million for mass transit including $99,960 to be used by local jurisdictions for South Shore operations. Congressman Benjamin admits that the amount earmarked for the South Shore was inadequate in relation to the total deficit but suggests that it shows a serious State commitment to save the service.

The Congressman stated further that now local Governments can use their revenue sharing money for the local match of other Federal programs and thus there is an additional source available for the capital improvement grant. In his opinion, each of the counties involved has sufficient revenue sharing moneys to make up the $2.3 million local match for section 3 funds and the county council presidents have agreed, in principle, to pay half of the local match with Indiana "kicking in" $3.5 million and the Illinois Regional Transportation Authority "kicking in" its proportionate share or $1,260,000. He sees a need for $35 million in capital improvements so that the local 20 percent match for a section 3 capital improvement grant would be $7 million. He is hopeful that by the end of the current session of the Indiana General Assembly in April 1977, the capital grant local match requirement will be available.

Lastly, Congressman Benjamin argued that alternate means of public transportation are woefully inadequate and that the cessation of South Shore passenger service would cause severe socio-economic problems.

Recently elected State Senator Dennis Geary of Indiana's 8th District expects that the proposed discontinuance would result in the increased use of private automobiles thereby causing increased air pollution, increased traffic on already congested highways, and increased reliance upon foreign sources of oil and gasoline. The Senator stated that the discontinuance would cause families to move from northern Indiana to the Chicago area where they are employed. This would result in a substantial loss of revenue to the local communities. He stated that jobs might be lost if transportation became unavailable. Senator Geary also suggested that the National Lake Shore Park would be harmed because the park was designed so that visitors could come by way of the South Shore. The local school children would also be deprived of the opportunity to go on field trips to Chicago because Indiana State law prohibits schoolbuses from crossing State lines. The Senator also stated that cessation of passenger service would result in a loss to the State of taxes paid by the carrier.

In response to questions directed at the inaction of La Porte County in raising a portion of the matching funds, Senator Geary defended the nonimplementation of a "head tax" because it did not take into effect corporations and would not be fair to all.

State Representative Clifford D. Arnold has served in the Indiana General Assembly since 1970. Representative Arnold opposes the discontinuance because of the asserted resulting negative impact on the environment, diminished land values, the loss to the State and counties of tax revenues paid by the carrier, the loss of employment that the carrier furnishes to many northern Indiana residents, and the possible adverse effect the discontinuance would have on the transportation and parking facilities at the Federal park at the Indiana Dunes. In addition, Representative Arnold asserts that the South Shore's passenger operations should be considered a commuter service only between Gary and Chicago, and that from points further east of Miller the service to Chicago should be considered an intercity operation.

Representative Arnold also states that although there have been laws passed by the General Assembly to aid public transportation none of the moneys so designated have ever reached the South Shore. Representative Arnold states further that the Indiana Legislature has passed a law allowing local communities to organize regional transportation department and to enact taxes to help fund public transportation. To date none of the counties in northern Indiana have enacted any per capita taxes (head taxes) or any other type of tax pursuant to the authority given by the Indiana Legislature.

Representative Arnold also stated that the majority of planning and building in northern Indiana has been going on south of the South Shore corridor.

State Representative Richard Bell, of the 7th District states that the discontinuance would result in severe hardship to the people of northern Indiana who use the service to commute to work in Chicago. Representative Bell fears that many of the commuters would be forced to either give up their jobs or move to the Chicago area. This would result in a detriment not only to the commuters directly affected but also to the businesses in northern Indiana who will suffer indirectly. Representative Bell requests that additional time be afforded so that the State and counties involved can unify their efforts to provide financial assistance to the South Shore. As a member of the Ways and Means Committee and the Interim Budget Committee, he knows of no money in the State budget for public transportation.

Terry Crone, assistant to United States Senator Birch Bayh, read the Senator's statement. The Senator offered his continued full commitment to the continued and improved passenger service on the South Shore.

Senator Bayh stated that the Federal commitment to continue the South Shore's passenger operations was actively and convincingly demonstrated as far back as 1971 when UMTA granted funds subject to the State and local interests granting matching funds. Unfortunately the State and local Governments could not raise the matching funds and the grant expired after 4 years. The Senator stated that UMTA would be receptive to another application, however, the State and local Governments are "in the same boat" as they were in 1971 and presumably cannot now raise the matching funds. The Senator hopes that the hearings will give the local Governments sufficient notice of the present emergency so that they will act to raise the matching funds.

In sum, Senator Bayh urges the Commission to deny the discontinuance based upon the public need for the South Shore commuter operation and the precedent established by UMTA's previous Federal grant.

Robert Rigney, assistant to United States Congressman John Brademas, read the Congressman's statement. The Congressman is optimistic about the possibility of local funding based on the formation of local organizations such as the Northwestern Indiana Rail Commuter Service Steering Committee. Such local organizations were said to be taking an active role in suggesting formulas for allocating non-Federal matching funds which might be approved by UMTA.

Congressman Brademas suggested that ridership might increase by having improved equipment and additional parking space at the stations. He expects that there could be an increase in ridership due to the recent expansion of the Indiana Dunes National Lakeshore.

The Congressman believes that both Illinois and Indiana would benefit from the continued passenger service by having less congested highways and increased economic growth along the South Shore corridor. Also continued use of the electric railway would save scarce fossil fuel.

Harry Wallace, chairman of the Indiana Public Service Commission, read a statement of Governor Bowen. The Governor asked the Commission to require continuation of the service for a full year. The basis of the request is that the State wants to complete technical studies and, if these studies support the concept of continued rail service, the State is prepared to assist local Governments in financing the programs necessary to continue service, within the limits of the State budget and legislative appropriations. Mr. Wallace acknowledged that the railroad had given notice it could not continue forever without financial help but stressed that the State needed more time since the discontinuance was filed in October 1976. He stated that the State does not oppose the discontinuance per se but is trying to buy time until this session of the General Assembly and the technical studies are completed.

Perry J. Maull is administrative director for the Institute of Urban Transportation in the Graduate School of Business, Indiana University. The State has contracted with the Institute for a Northwest Indiana corridor study which is needed to fulfill the Urban Mass Transit Administration's Planning requirements for a capital grant. The study, which was begun November 1976, and will be finished June 30, 1977, will develop the public's plan for passenger transportation in the corridor and its final analysis may or may not contain the continuation of the rail passenger operation.

Ronald N. Oberg is president of the La Porte County Public Transportation Authority (LCPTA) which was created in April 1976. Mr. Oberg believes the public sector had little incentive to act until after February 1973, since it believed until that time that the South Shore was going to supply the needed local match. He contends the railroad has done little to promote passenger service and attributes the decrease in ridership to the decrease in the number of trains. The La Porte County Council has not voted on whether to impose a head tax which was authorized by the State legislature in 1975 but Mr. Oberg has only learned recently that revenue sharing funds can be used as a local match.

Save Our South Shore (S.O.S.S.) is a citizens' group formed in March 1976, dedicated to preserving the railroad's passenger service and is responsible for several hundred letters sent to the Commission by people favoring retention of the service. Mr. Lucuis Donkle the group's president believes it would be a tremendous blunder for the Government to allow the discontinuance of service when within the next few years getting commuters out of cars and onto trains will be the keystone of a new national energy conservation program. S.O.S.S. has circulated literature listing 10 reasons why the service should be retained and urging people to take steps to preserve service. The group estimates it would cost $50 million to transform the South Shore into a thoroughly modern rail system while the cost of replacing it in 10 or 15 years might be a couple of hundred million. It has communicated its views to members of the Indiana legislature and believes that a year is needed to find a solution to the problem.

Lester C. Peach, of New Buffalo, Mich., is the treasurer of S.O.S.S. Mr. Peach has used the South Shore daily for the past 12 years to commute between Michigan City and Chicago. He contends there is no alternative public transportation available for commuters between these points and that they are the ones who will suffer most if the trains are discontinued. Mr. Peach suggested that the Commission delay discontinuance for a reasonable period until an answer can be found.

Walter F. Liebig, president of the La Porte County Council, requests that present passenger operations be continued so that the four counties in northern Indiana, La Porte, Lake, St. Josephs, and Porter, can have time to organize a four county transportation authority. Presently, only La Porte and Lake Counties have enacted public transportation authorities. The La Porte County Council enacted a county transportation authority in April 1976, but the County Council has enacted no tax pursuant to the authority granted by the State Government.

Mr. Liebig asserted that the discontinuance would cause irreparable harm because the electric railroad right of way would be impossible to duplicate. He asserted that the National Lakeshore Park would be damaged due to the additional automobiles that would be used to transport the people formerly using the South Shore. Additional parking space would also have to make available at the dunes thus destorying a portion of the national park.

Michigan City Mayor Joseph R. LaRocco testified that the discontinuance would not be in the city's best interests. The Mayor stated that if the passenger service were discontinued, he would do everything within his power to have the freight traffic rerouted so that it would not go through the middle of town.

Charles Oberlie, planning director and the executive director of the Michigan City Department of Redevelopment and Community Development, stated that the South Shore will play an important role in the future development of the city. Future plans include relocating the South Shore from its present location on 11th Street to an area currently undergoing redevelopment. This would result in a separate high speed corridor which would reduce the number of accidents caused by the train in town.

Mr. Oberlie also noted that the north and northeast portions of the city, where the South Shore operates, possess the most potential for growth rather than the southern portion which is limited due to the lack of sewerage. He also suggested that the town marinas might be expanded at some future time and this could result in added summer residents who might use the South Shore to commute to Chicago.

Lastly, Mr. Oberlie suggested the issuance of municipal revenue bonds to raise money for the South Shore.

Stanley Przybylinski, president of the Michigan City Common Council, urged that the South Shore has intentionally discouraged ridership by using filthy cars and inconvenient schedules and that the elimination of passenger service would have devastating economic effects on the community. He requested that the Commission either reject the petition for discontinuance or grant the State additional time to study the full impact of the petition.

David Druley, president of the Michigan City Area Chamber of Commerce, testified that the South Shore is vital to the economic well being of Michigan City. Mr. Druley suggested that the Dunes National Lake Shore Park could become a potential source for ridership in the future.

Ronald L. Kroening, local chairman of the Brotherhood of Railway Carmen, testified on behalf of 57 union members. Mr. Kroening has been an employee, of the South Shore for the past 16 years and has been the local chairman for the past 9 years. Mr. Kroening expressed the fear that approximately 30 people will lose their jobs as a result of the discontinaunce which would adversely affect those dismissed as well as the entire city. Mr. Kroening testified that the rolling stock is in poor condition not only because of the equipment's age but also because of a lack of maintenance which he describes as "planned deterioration." Mr. Kroening stated that under the auspices of the former superintendent of equipment, cars were brought into the shop for extensive repairs every 100,000 miles. However, for the past 5 years there has been no scheduled overhaul on equipment.

Edna P. Kitchell, a geneologist historian, is the town historian of Michigan City. Ms. Kitchell told of the excitement and festivities in Michigan City when the South Shore commenced operations in 1908 and the dread she will bear if she must write in the town annals that the South Shore's service has been discontinued. In addition to her duties as town historian, Ms. Kitchell serves as vice-regent to the Illinois division of the Magna Carta Dames, an organization whose members must trace their ancestors back to the year 1215 and is an active member of the Central Church of Chicago. Thus, she must use the South Shore several times a month to go to Chicago to use various libraries and attend church functions. Ms. Kitchell no longer uses her automobile and is dependent upon the South Shore for transportation. She noted the many benefits that have come to Michigan City because of the South Shore and is saddened by the fact that people in general do not have the same regard for property, life, safety, and appreciation that they used to have. In her opinion, we cannot expect trains to keep up a certain standard when many people fail to keep up their standards. She believes that if freight traffic is to be continued, careful consideration should be given to retaining passenger service because the South Shore was intended to be a passenger line. If passenger service is discontinued, the freight traffic should be rerouted. In Ms. Kitchell's view "We are living in a very highly commercial age but there are some things we shouldn't lose, and I hope the vision will remain and we will keep the South Shore."

Harry C. Ryan of Chesterton uses the South Shore up to three times a week to attend cultural activities in Chicago. He usually takes the 12:45 a.m. train out of Chicago and believes it would be extremely impractical and burdensome to make the trip at such a late hour by automobile. Service is reasonably good and he has no complaints. Mr. Ryan is interested in public transportation and is dismayed at the thought that many small communities have no public transportation and must consequently rely exclusively on the automobile for transportation. Mr. Ryan decried the emphasis in recent years on the highway and the automobile and suggested that such emphasis might be very shortsighted. He believes public transportation to be essential for those people who cannot afford an automobile, who do not know how to drive and for the elderly and invalids who can no longer drive and that this country is going to regret the actions of the last generation or so in eliminating much of public transportation.

Patricia Dubois of Beverly Shores has used the South Shore to commute to her office at the Continental Insurance Co. of North American (CNA) in Chicago for the past 15 years. Ms. Dubois uses the monthly commuter ticket, costing $79.59, and travels between the Beverly Shore station and Van Buren Street aboard westbound train No. 258 and eastbound train No. 271. Ms. Dubois owns an automobile but prefers to commute by train because of the heavy traffic and scarce parking in Chicago. She is concerned that cessation of service would cause great hardship due to the lack of alternate public transportatoin. Employment prospects in Lake or Porter Counties are bleak and suitable employment would be difficult to find. Moving to Chicago would result in financial loss due to the increased price of real estate in the Chicago metropolitan area. At her request, the CNA produced a computerized study of 350 CNA employees who live in the Indiana counties served by the South Shore.

Andria Abbott is the transportation chairman of the League of Women Voters of the Michigan City Area (League). The League favors urban mass transit and urges that such transportation be fully developed to reduce vehicular pollution, provide equal access to housing and employment, and also to develop alternate transportation systems. To achieve these goals the League recommends: (1) Cities must have the opportunity to plan and adequately finance integrated transportation systems of their own choice; (2) the Highway Trust Fund should be restructured so that cities and States may use the fund to build whatever form of ground transit they find necessary; (3) alternate forms of transportation such as trains, buses, moving sidewalks, bicycles, and streetcars must be developed into comprehensive transit systems; (4) transportation systems dependent on public financing should be publicly controlled; and (5) continuous and widespread community participation must be ensured throughout the planning, development, and operation of any transit program.

The League believes that it is quite possible that legislative action would have been taken sooner enabling the local sector to come up with its share of local funds if the South Shore had not said between 1969 and February 1973, that it would finance the local funds for the Federal grant. It sees as paradoxical the Federal Government's enforcement of energy conservation methods and an approval of this discontinaunce which will increase petroleum consumption.

Louis J. Carque, of La Porte, stated that any business, including a railroad, should not be forced to operate without making a profit. He asserted that new equipment or improved stations would not increase ridership because over the years riders have expressed their preference for the private automobile. Mr. Carque suggests that the only way to increase ridership would be to rip up Interstates 80 and 94. Mr. Carque does not want to see his tax moneys spent in the form of public subsidies to assist what he considers a "dead horse."

William J. Janssen was the assistant superintendent of the South Shore's mechanical department from June 1967 until his dismissal in September 1973. He stated that he undertook various maintenance programs to prolong the life of the equipment and reduced the frequency of equipment failures but he was hindred in his efforts. He suggested that more attention to preventive maintenance would alleviate problems of breakdowns in bad weather. He accepts that new equipment is needed but, in the meantime, he would place his faith in the ability of the Federal railroad inspection agency rather than a consultant's opinion on the equipments' structural integrity.

Charles P. Nosser, chief clerk in the South Shore's Way and Structures Department, is president and Indiana Legislative Representative for the Brotherhood of Railway and Airline Clerks Local Lodge No. 45 which has some 53 members. If discontinuance is allowed, 50 percent of the Local's 43 railroad employees could lose their jobs and four of the members could lose their entire family income since both husband and wife are railroad employees.

Dr. Latourette Stockwell of Michigan City stated that as a senior citizen she can travel on the South Shore to and from Chicago for less than she pays in taxi fare to go shopping at the Michigan City mall. She is appalled at the lack of public transportation available to Michigan City residents and remembers when there were three buses daily to Indianapolis. There are none today. She is impatient with the transportation officials in the four affected counties and wonders how the United Nations will work if four counties can not get together to support something as important as public transportation in northern Indiana.

Leoanas Valiulis of Beverly Shores said that his wife and daughter have been forced to rent an apartment in Chicago because they feared train service would end and they cannot afford to give up their jobs there. Mr. Valiulis is critical of the effort and expense local politicians have put toward enlarging the Indiana Dunes National Lakeshore Park, a move which, he believes, eliminates homes and passengers for the

South Shore. Mr. Valiulis does not think park visitors will come by the train when a family of four or six people will be able to get to the park cheaper by private auto.

Dr. Ann Jernberg of Beverly Shores is a clincial psychologist and uses the train to go to Chicago 3 days a week. She believes that many professionals settle in La Porte County relying on the South Shore's service to continue to avail themselves of the educational opportunities in Chicago. If service is discontinued, she and her family will move to Chicago.

Jared Silberman, of Michigan City, an attorney with Bethleham Steel stated that Bethleham is constructing a new plate mill facility at Burns Harbor that will give it the largest capacity of any plant in the United States. Also a tandem mill is planned for the near future so that the South Shore's fears that its freight traffic will not increase are without support. In the same vein, Attorney Silberman quoted Federal Energy and Research Administration statistics that by the year 2000 coal will still amount to 20 percent of this country's energy use, however, total energy consumption is expected to double so that we will be using a great deal more coal. Attorney Silberman believes the evidence shows that bus service is no reasonable alternative to the train service under consideration.

Stan Rux of Michigan City has been commuting into Chicago on the South Shore since 1946. If service is discontinued, he will drive to Harvey, Ill., and commute on the Illinois Central Gulf because he will not drive into Chicago.

David Law of Long Beach has been riding the train to work in Chicago for 20 years. He considers that the railroad does a good job with the equipment it has. If service is discontinued, he will be forced to sell his home and it would cause him economic hardship. He was involved in three accidents during the time he belonged to a car pool driving to and from Chicago.

Bernice Pearce is the wife of a South Shore employee, age 61 with 20 years experience. Mrs. Pearce has been ill and would have trouble finding a job. She has a young son at home and she described how difficult it is for the family of South Shore employees not knowing if they will continue to have incomes.

Bonnie Clark a Michigan City realtor believes the South Shore is an important ingredient to the sale of homes in the Michigan City area. In 1975, she had 22 sales in which the existence of the South Shore's passenger service was a consideration.

Joyce Keane of Michigan City is married to a Chicago commuter who will have to give up his job if service is discontinued. Mrs. Keane is a free-lance commercial artist and she will be unable to service her Chicago accounts. She sees discontinuance as including damage to the environment, loss of family income or relocation and loss or cultural opportunities. She does not want extra taxes but believes the South Shore needs public support to survive.

Robert Allan of Hobart is a commuter who believes the South Shore's fare collection procedures are faulty, that the railroad should have raised its fares and that the law should not allow a railroad to terminate passenger service if it is making money on its freight operations so that it can be considered profitable overall.

Arlene Smith of Michigan City has taught in Chicago for 25 years and commutes daily. She does not drive and would not be able to get a job locally without serious financial hardship. She supports two children and with service the way it is she must get the 6:30 a.m. rather than the 7:19 a.m. to get to school on time.

Jan and John Mokrychi have lived in Michigan City all their lives and have fond memories of traveling on the South Shore. Mrs. Mokrychi is a free-lance designer and an art student and commuting to Chicago by train is very important to her. Mr. Mokrychi does not understand the railroad's attitude on passenger service and he does not like the idea of giving it money but he wants service retained because it is a unique asset for Michigan City.

SOUTH BEND

Approximately 70 witnesses testified at South Bend, most of whom are occasional users of the South Shore.

South Bend Mayor Peter J. Nemeth, requests that the carrier be made to continue operations for 1 year beyond April 8, 1977, so that local governmental officials can determine the future need for rail commuter service in the South Bend-Chicago corridor. The city assists the local bus company with revenue sharing funds.

Mayor Nemeth stated that the city supported the Chessie acquisition of the South Shore because the Chessie promised it would help rejuvenate the South Shore passenger operations. The Mayor believes the Chessie broke its promise and the resulting poor condition of the passenger cars is a major reason why ridership has decreased. While admitting that only about 2 percent of the South Shore's riders embark from or are destined to South Bend, the Mayor contends that there is potential for increased ridership because of the economic growth of the community and also because the 1st Joseph County Airport Authority Board plans to construct a multimodal transportation facility at the Michiana Regional Airport.

The St. Joseph County Airport Authority has ambitious plans for a multimodal terminal (airplane, rail, and bus) facility at the Michiana Regional Airport. Lloyd S. Taylor, secretary of the Airport Authority outlined these plans and the provision in the Airport and Airway Development Act amendments of 1976, Public Law 94-353, which authorized the Secretary of Transportation to undertake a demonstration project at South Bend. In the plan, the South Shore's line would be extended to the airport terminal making rapid transit service available to airport patrons. Three million dollars has been allocated to this part of the project. One of the two intercity bus lines, Indiana Motor Coach, has said it is not interested in participating, the other, Greyhound, has not responded. The planning is awaiting a determination on these Commission proceedings and the Authority is willing to work with the railroad to make application for Federal funding for this project. After a successful application and treatment of the environmental issues, the project is expected to take 30 months to complete.

James H. Lahey speaking on behalf of the South Bend-Mishawaka area Chamber of Commerce stated that the South Shore service is an important element in the community's future economic growth and development and is needed to conserve fuel and protect the environment. Mr. Lahey suggests that better public relations and improved equipment would attract riders.

William H. Mauk, Jr., a member of the St. Joseph County Council, questions the railroad's theory of avoidable costs and requests that the present service be continued through April 1978, so that answers can be found for several questions including the impact of discontinuance on the local Government directly affected and if the service is found not to be financially viable, whether the cost to the taxpayer of keeping it running would be more or less than the benefits received. The St. Joseph County Council has made no commitment to provide funds for the South Shore nor has it formed a transportation authority since it believes the question involves four counties and under present law it could only join with La Porte County.

Kathy Peterson, representing the South Bend League of Women Voters (League), requests that the discontinuance be denied to afford the carrier, the State and the various local Government the opportunity to obtain financing. It contends that the South Shore is needed to provide equal access to employment, to conserve fuel, and to protect the environment. The League petitioned the St. Joseph County Council and the Indiana State legislature to form and fund a regional transportation authority. In June 1975, the League brought the issue of a subsidy for the South Shore before the County Council but no action has been taken.

Roger Birdsell, Jr., director of the Michiana Economic Development Foundation, Inc. (Foundation), requests the continuation of the existing South Shore service until State and local Governments have time to act on a study on rail commuter service needs in the corridor which is to be completed June 1, 1977. The Foundation got community leaders together in May 1976, and from this came a steering committee which was instrumental in getting a study started by the Indiana Mass Transportation Improvement Project at Bloomington, Ind. As a regional business association, the Foundaton believes a strong transportation system is essential for the continued economic prosperity and growth of north central Indiana, southwestern Michigan, and the greater Chicago metropolitan area. It believes that the South Shore should not be forced to lose money indefinitely and that public subsidies must be implemented in the near future if the service is to be improved to meet public transportation needs.

George L. Kruse, Jr., executive director of the Michiana Area Council of Governments, is serving as staff advisor to the Northwest Indiana Rail Commuter Service Steering Committee. He noted the $100,000 study entitled Northwest Indiana Rail Transit Improvement Project and wants the Commission to order (1) the South Shore to make $1 million in safety improvements, (2) the South Shore to promote the use of the service, and (3) service continued through April 1978.

Raymond Magyar, a graduate student at Notre Dame, discussed alternative service and suggested that perhaps this last interurban railroad could be preserved as a national historic site.

Paul Franklin Willer of Eau Clair, Michigan suggests that the Commission direct the Governor of Indiana to call a special legislative session to form and fund a regional transportation authority if the legislature does not do so at this session.

Evelyn and Russell Fink of South Bend favor retention of the service. She used it for 2 years to get a graduate degree at the University of Chicago. He is disappointed that elected officials are not doing more to promote this type of transportation.

Jerry L. Berntsen uses the South Shore a few times a year and would use it more if service were improved using better equipment and more convenient schedules. Recently he drove his family to Niles, Mich., where they took the Amtrak to Chicago instead of using the South Shore.

Bernet Bauer, a former State legislator and occasional rider, suggest that the carrier has neglected the passenger service in order to discourage people from riding the trains. Mr. Bauer sponsored the bill in the legislature which gave the local communities the right to form public transportation authorities and the one allowing local units of Government to do what they wish on taxing for mass transit purposes. He believes that the loss of passenger service would have a negative impact on South Bend and that the Interstate Commerce Commission has a duty to protect the community and its citizens. Mr. Bauer suggests that because the railroads are a quasi-monopoly that have been granted aid from the Government they should not be allowed to enjoy the fruits of the freight business and discard the passenger business, rather the public welfare should be the paramount concern.

William P. Palmer III, of South Bend was project coordinator from July 1975 to October 1976, for a transportation grant to Indiana University. He believes the South

Shore is not as successful as it might be because all the passenger traffic goes into Chicago and later returns. This one-way travel might be helped if the Michiana Regional Airport were developed. Mr. Palmer does not know of any commuter railroad in this country which is profitable. He does not think the State legislature provided a fair and equitable taxing system to promote local funds for the South Shore but he thinks the South Shore has some responsibility too. He noted that the Chessie knew the passenger service was a diminishing business when it acquired control of the South Shore and suggests that improved marketing techniques could help make it a viable two-way railroad. Mr. Palmer sees groups emerging who are trying to deal with the problem but they need additional time to develop programs because once service is discontinued it will be impossible to resurrect it.

Grady L. Thompson operates a taxicab at the South Bend station. South Shore passengers constitute the bulk of his business and if service is discontinued he will probably be out of business. He believes the carrier has been remiss in its duty to serve the public by not providing adequate station facilities where people can wait for trains and he worries about the effect of discontinuance on the future of South Bend.

John V. Lindstaedt has not used the South Shore for some time because the station is in a high crime neighborhood. He believes the lack of station facilities discourages people from riding the trains. He considers public transportation a vital public service rather than a business and requests time so that funding can be found. Mr. Lindstaedt is president of the Fair Tax Association of St. Joseph County and the group is divided on whether the railroad should receive subsidies.

Si Sclamberg stated that since the Chessie has shown it is disinterested in passenger service by downgrading service, the solution might be in an employee-owned company along the lines of the South Bend Lathe Company, an employee-owned company which formerly was part of American Steel. Mr. Sclamberg stated that an employee owned South Shore could operate successfully and would be an improvement over present management. He admitted that the move of the station from downtown South Bend was initiated by city officials.

Cherry Clark uses the South Shore once or twice a week to go to school in Chicago. She would be willing to pay a third to a half more to insure continued operation. She noted the ways highways are subsidized and commented that subsidies for railroads do not seem unreasonable in comparison, especially since they are more energy efficient.

Charles Willer, of Angola, Ind., requests the continuance of service for 2 years, along with an immediate temporary subsidy, so that State and local Governments can study the issue and arrange for financing. He believes Indiana's inaction is very shortsighted and suggests that the State of Michigan would have dealth creatively with the situation. He is critical of Indiana's attention to railroad issues citing the Little River Railroad excursion line in Angola and the new Hillsdale County Railway between Hillsdale, Mich., and Angola. Mr. Willer opposes discontinuance because of nostalgia, for his present transportation needs, as a concerned, ecologically minded citizen and as a student of the transportation industry.

Naomi Nelson of South Bend uses the train intermittently for entertainment and shopping and she would like service retained because she considers it the most efficient, convenient, and economical way to get to Chicago.

Charles Vogel of South Bend told of an incident that occurred to him around 11 p.m. New Year's Eve 1976 when he tried to travel with his wife and daughter from Chicago to South Bend via the South Shore. Mr. Vogel uses the train a few times a year to visit relatives. He would like to have service retained.

Carl Opperman of South Bend rides the train about once a month. He thinks it would be a mistake to eliminate service and that more people will ride trains in the future.

Kathy Wittenbrink of South Bend wants service retained because she believes there has to be an alternative to private transportation.

Sandy Chanock and Frances Sliger of South Bend use the service occasionally and think it should be retained.

Edward C. Ullery of South Bend does not use the train frequently but would use it more if the equipment were better and service more frequent.

David A. DeWitt of Elkhart worked for the South Shore summers from 1972-1974. He said the workers' attitude toward their employer was excellent and the railroad was very concerned about the safety, comfort, and cleanliness of the cars but the age of the cars made the work increasingly difficult. He believes in the long run it will be unfortunate if service is discontinued since the price of energy is sure to increase.

Henrietta A. Kocy of Elkhart complained that the train carrying her 14 year old daughter arrived in South Bend at 8:30 p.m. on December 30, 1976, when it was suppose to arrive at 7:18 p.m. There were no accommodations and people had to wait in the cold with the temperature near zero. Mrs. Kocy does not use the train but her children do frequently.

Margaret Harvey of South Bend praised the South Shore's senior citizen fares which allow her to ride into Chicago for $1.55.

Martha Jane Fields of South Bend does not think the situation needs any more study. In her view the need is obvious. She does not consider the bus an alternative as the trip is longer and the schedule is not convenient. She recalls World War II and how in that emergency people had to rely on mass transit.

Vince Phillips of South Bend thinks the South Shore is not a profitable passenger operation because of an obsolete marketing strategy. He has only recently rediscovered the service and is surprised how much cheaper and convenient it is than bus or private auto.

Eugene Bella, president of the Northern Indiana Philatelic, stated his members use the train two or three times a year to go to stamp shows in Chicago and requested that they be given a year in which to convince county officials to supply subsidy funds.

St. Joseph Commissioner, Richard Larison, said the county is considering establishing a public transportation authority but no vote has been taken. He requests more time because there are people who need the service. Commissioner Henry Ferrettie made a similar request.

Randy Paul Marchant of Mishawaka sees the South Shore as an example of an older institution which is once again needed because it is the most efficient form of non-polluting transportation.

Velma Torzewski, a member of St. Joseph County Council, said the Council was very concerned about the discontinuance. She agreed the location of the station is bad and wondered why the Council ever decided to move it from downtown.

Franna Baetty of South Bend does not use the train much but wonders if it is reasonable to abandon the best available form of public transportation.

Pat Rand of South Bend thinks that the train is not needed if it is losing money. He does not favor Government subsidies.

Arthur Bostian of South Bend uses the train to commute to work in Chicago. Without train service he would have to drive or move and neither of these are attractive alternatives. James Clinton, Arthur Bernard Mellin, and Russell Austin made similar statements.

Alice Harvey of Chicago uses the train almost every weekend to visit her family in South Bend.

John H. Canavan moved to South Bend 7 years ago because it was a nice community in which to live and he could commute to his job in Chicago. He has almost 30 years with Illinois Bell Telephone Company so he cannot afford to give up his job. If service is discontinued, he will have to move or find accommodations in Chicago for himself during the week. Both of these alternatives are expensive and unpleasant. He is critical of the railroad's failure to promote its service and believes service should continue for the many people who cannot or will not drive into Chicago.

Arthur Lawrence of South Bend points out that the Chessie is a profitable operation and he believes it promised to continue passenger service when it gained control of the South Shore. He questions the railroad's cost figures, low fares, and calculator that the gasoline consumed by 72 people driving into Chicago would be 864 gallons a day.

GARY

Over 80 people testified in Gary, most of whom use the South Shore reguarly to commute to work in Chicago.

State Senator John Bushemi of Gary considers service vital to many residents of Lake County. In 2 days he will attend a joint House and Senate Conference of all members from northwest Indiana on this issue and he pledged his support to help obtain funding from the Indiana General Assembly for operating expenses and capital expenditures.

Gary's Mayor, Richard Gordon Hatcher, believes discontinuance would cause ecological, economic, and human havoc in Gary and would place Gary's future development in grave jeopardy. The Mayor noted that Gary is in one of the most polluted areas in the country and that additional pollution could not be tolerated. If passenger service is discontinued, many riders would be forced to resort to the private automobile increasing automobile emissions. He does not consider alternative transportation by bus or rail adequate. Buses are slowed by the high level of highway congestion and Conrail is nonelectrified and is not geared to provide extensive commuter service.

Some 87 percent of the Gary riders use the South Shore to commute to work and without such service they would have to relocate or give up their jobs. This would create a severe hardship for them and the State and local Government which would lose substantial tax revenues. Unemployment and underemployment are two of Gary's most pressing problems. The South Shore provides a means of access to the giant new steel mills being built by Bethlehem Steel and Midwest Steel at Burns Harbor, as well as other economic opportunities. In addition, construction will begin in early 1977 on expanding Gary's general aviation airport, located beside the South Shore's right-of-way and it is hoped it will become a regional facility in the future. The railroad will provide easy access to the airport for residents of South Chicago, Cook County, and northwest Indiana.

Gary is receiving Federal assistance to help run its bus system and Mayor Hatcher favors subsidies for the South Shore if it is the only way the railroad can continue to operate. He was not aware of any formal statement by the city on the issue.

James W. Hollan, deputy mayor of Gary, is secretary of Gary Public Transit Corporation and on the board of the Northwest Indiana Public Transit Authority, commonly thought of as the regional transit authority for the county. He noted that because there are four Indiana counties involved, a solution is difficult due to the varying interests of the large constituency represented by the four county councils. He also noted that the South Shore had been allocated $99,960 in 1975 and $79,537 in 1976 under the Indiana Transportation Grant Program. These sums are insufficient but they do indicate that some efforts are being made and he does not think the South Shore ever took advantage of them. Since he became deputy mayor in 1972, he has been involved in attempts to provide the necessary money to continue South Shore service. As he explained, Gary does not have the luxury of setting priorities for where it will spend money, rather money goes to what is absolutely necessary in terms of community needs at that moment. He recommends that the Commission deny the railroad's request so as to allow time for State and local officials to solve the problem. He expects it will take at least 6 months because the legislature has to be given time to act.

LeRoy Fisher, manager of the Gary Public Transportation Corporation which operates buses within the city of Gary and to Inland Steel and Youngstown Steel in East Chicago, spoke in favor of a coordinated bus and rail system. He acknowledged the need for external financing for the South Shore, both for capital and operating systems. The bus company has been receiving public funds since April 1975, when it became publicly owned. Mr. Fisher does not think bus service would substitute for the present train service between Gary and Chicago.

Rosalee Cohn, executive director of the Gary Commission on the Status of Women, wants service retained because it is a vital part of the local transportation system. The Commission's top priority is widening job opportunities for women and it is concerned that, if the South Shore stops moving passengers, many women will have to give up their jobs or buy cars and pay expensive parking fees. Many of the affected women are heads of households and they cannot bear these added expenses. Some women are maintenance workers who commute late at night and driving would be dangerous. The unemployment rate for women, especially black women, is twice the rate for men. Ms. Cohen thinks the unemployment rate for women in Gary would be close to 33 percent. Closing this means of reaching the job market will increase the unemployment rate which, in turn, will increase the welfare rolls.

Sadie Allen of Gary is a car cleaner for the Illinois Central Railroad in Chicago and has ridden the South Shore 5 days a week for 33 years. She goes in on the 7:05 and has returned on the 4:05, 4:20 or 5:05 looking for a seat but has been unsuccessful. Mrs. Allen does not drive and must work for 3 more years in order to be eligible for a pension. If the South Shore discontinues service, she would be forced to resign because she has no other means of transportation.

Josephine McCloud of Gary is a chambermaid at the Conrad Hilton Hotel in Chicago and has been commuting on the South Shore for 27 years. She has no other way to get to work and is supporting herself and her great grandson. She wants service continued for the many people like herself who cannot live on just a pension or social security and need some way go get to work.

Rose Peres of Gary rides the 5:05 into Chicago and the 3 or 3:30 home, 5 days a week. She has tried the bus and the Penn Central and prefers the South Shore. She does not believe in complaining, the main thing is getting to work and coming home. She can understand whey it might be losing money but she just hopes that someone will help keep the train going because discontinuance will hurt a lot of people like herself.

Charles Perry of Gary has used the South Shore for 2 years to commute to his job in Chicago. Recently he bought a new home in Gary but if service ends he will have to relocate because a job in Gary will pay him $5,000 less than he is making now. He will not drive into Chicago. He tried it once and it made him a nervous wreck. The Penn Central service is no alternative because he often works late and Penn Central has no late trains. He thinks South Shore's fares are too high and he would not be willing to pay more because the trains are never on time. He works for Illinois Bell Telephone and thinks that cross-subsidization is sometimes necessary for a company that serves the public. On the other hand, he favors subsidies for new equipment and to keep the service going.

Leatha Hale of Gary is an accounting clerk for the Internal Revenue Service in Chicago and provides the sole support for her two teenage children. She might be able after awhile to transfer to Internal Revenue's Gary office but it is smaller and does not have the same opportunities for advancement as Chicago. In March she started training as a tax technician so continued service is very important to her. She can drive but will not attempt the trip into Chicago.

Dorothy Outlaw works and attends college in Chicago. She has used the South Shore for the past 3 years, 5 days a week and finds it extremely convenient. Discontinuance would cause her to face several unpleasant alternatives.

Edward W. Hood of Gary has used the South Shore since 1969 to get to his job in Chicago. He thinks service should continue. He selected his home so that he could walk to the train when necessary. If he were to drive into Chicago, it would cost him an additional $118 per month, over the cost of the South Shore, and he would have to contend with heavy traffic, longer travel time, and other automobile related difficulties. In his view, service was very reliable during 1976 and the last 2 months of 1975 but problems began to occur during December 1976, and it has gone from good to bad. If service is discontinued, his most feasible alternative would be to relocate. One less taxpayer might not make a difference to Gary and the State of Indiana but 2,000 less taxpayers and a possible 1,000 more unemployed people would.

Ronald Sullivan heads the Gary Manpower Administration, a federally funded program which provides training, work experience, and jobs for disadvantaged, underemployed, and unemployed Gary residents. On the average some 1,000 people are in the program. Because there are not enough training facilities available locally, Gary Manpower sends its clients into Chicago and it has found the South Shore the best way of getting them there. Since 1974, 281 trainees have used the South Shore at a cost to Manpower of $82,000 and the same number of trainees is expected for the next 2 years. Most of the people do not have cars and it would cost more and be impractical to run special buses rented from Gary Transit. Approximately 8 out of 10 people trained in the Chicago area find jobs there, and Gary Manpower has also been successful in making direct placements in the Chicago area. Mr. Sullivan believes that discontinuance of service would be most disruptive to people in the lower income wage levels, and he is hopeful that a program can be developed which would continue service.

Through arrangements made by Gary Manpower, Pamela Holder is a student at the Walton School of Commerce in Chicago. Ms. Holder uses the South Shore 5 days a week to get to school and has neither an automobile nor a driver's license. She does not think bus service would be a viable alternative because of the problems with traffic and bad weather.

James O. Foster, Jr. attends school in Chicago as part of the program of Gary Manpower. He thinks the demise of the South Shore would mean a great outflux of people who depend on it to get to their jobs in Chicago.

Sharon Floyd attends school in Chicago under a Gary Manpwer program. She spoke in favor of keeping service so that she can continue her training.

James Ray of Gary has used the South Shore to get to school in Chicago 5 days a week for a month and a half. His training is part of Gary Manpower's program. He says most people in Gary are looking for jobs. The city's motto is "City on the Move" but in his opinion, without the South Shore people are going to move out.

Deric Mitchell is a trainee for the Gary Manpower Administration and has been using the South Shore 5 days a week for a month and a half.

Carmen Acs of Gary has been using the South Shore 5 days a week for 9 months to attend school in Chicago. She is a single parent with three dependent children and believes she must commute to Chicago because it is where jobs are available. She worked in Chicago previously but had to stop and this meant going on welfare and being on public aid was hard because public funds expect much from an individual. She does not drive. If the South Shore stops, she believes her 9 months of schooling will be wasted.

Bridget Finch of Gary also attended school in Chicago through Gary Manpower and graduated in January 1977. She has been taking the South Shore 5 days a week for 9 months. She spoke for about 52 recent graduates describing how prospective employers in Chicago have noted their dependence on the South Shore and the fact that service might stop and she believes this hurts their chances of getting a job. She considers herself a skilled secretary but if she cannot get a job in Chicago she will be forced to look for work in one of the steel mills.

Fanny Davis of Gary is a public school teacher in Chicago. She has been a commuter for 14 years and knows of at least 15 other teachers who also commute on the South Shore. She has made better time getting to her job than people living in Chicago. If service is discontinued, she would have to relocate and give up her home. Caloral Gelter of Gary is also a public school teacher in Chicago and gave similar testimony.

Ronny Predovich of Gary is a secretary in Chicago and has been commuting since 1969. She can understand the railroad's argument but wonders what will happen to all the people who rely on service, who built their lives around it and who thought it would always be available. She thinks Government should take a long, deep look at how working people's lives will be damaged. Relocating is very difficult; people cannot just get up and move. There are few employment opportunities in Gary and they only pay half of what you can get in Chicago. She cannot afford a new car or the expense of driving into Chicago.

Shirley Marson lives in Merrillville, Ind. Her husband uses the South Shore 5 days a week and she uses it occasionally to take a relative to a Chicago hospital because she will not drive into Chicago. If service is discontinued, her family will have to move and it would be very disruptive. She called Governor Bowen's office for assistance and a Mr. Watts told her there was nothing they could do because the people in southern Indiana were not interested in the South Shore.

Marie Smith of Gary has been commuting to Chicago 6 days a week for 20 years. She questions why the railroad has not improved the service.

Adele Bauer of Gary has been using the South Shore to get to her job in Chicago since 1939. Her salary is double what she can get in Gary for the same type of work. She does not own a car and has tried riding with other people and did not like it. She owns her home and does not want to sell it.

Teresa Keith of Gary could not find a job until she looked in Chicago. Now she is an internal operator with Prudential Insurance and likes it because she has a chance to advance to a computer programmer. She has no other way of getting to work but the South Shore.

Maurice J. Salowsky of Gary uses the South Shore 3 days a week to go to Chicago. He believes the Chessie knew of the passenger service when it took control of the South Shore and is obliged to continue it.

Sheila Mapolakis of Merrillville is a legal secretary in Chicago and has been riding the South Shore daily for 11 years. She tried finding a job locally and learned she would have to take a pay cut of 40 to 50 percent. If service is discontinued, she will have to move or drive into Illinois and catch the Illinois Central Gulf.

Reverend Dorsey Taylor, Pastor of the Mount Zion Baptist Church in Michigan City, thinks the train helps the area's economy and favors subsidies to keep the service going.

Judy Carlile of Gary is a legal secretary in Chicago and has commuted for 12 years. She believes Indiana should have done something sooner since there have been rumors for many years that service would be discontinued. She was under the impression that money from the past fare increases was to be used to improve service but that never happened. Comparable jobs are not available to her in the Gary area and, even if she could find a car pool, she would lose her overtime earnings.

Michael McCarney has commuted 5 days a week since 1969. He expects that driving to Chicago would cost $150.64 a month, plus car maintenance and insurance, where the South Shore costs $76.

LeRoy Liptak works at Inland Steel and expressed Local 1010's opposition to discontinuance. The Local has 18,000 members but the time was too short to determine how many used the service.

Don Marson of Gary has been riding the South Shore for 20 years. He remembers when the fares went from $44 to $62 and people got upset and stopped riding the train. If service ends, he will have to relocate which will mean taking his children out of school and trying to find a place in Illinois which is sure to be more expensive. He does not want to move from an area where he has lived all his life but he will not drive into Chicago. He does not understand how the government could let discontinuance happen when the emphasis is on conserving fuel.

Wendy Pettet of Gary is a cost accountant and commutes daily to Chicago. She was in a car pool from May of 1972 to December 1973, and will never do it again. Driving cost her about $150, not counting wear and tear on her auto or the additional auto insurance required when you use your car to drive to work, and took 1 hour and 10 minutes in normal weather. The train costs $62.25 and takes 55 minutes. If service is discontinued, her choices are to give up her job or move to Chicago. She does not think she can find a comparable job in Gary and she does not believe she could enjoy the same standard of living in Chicago.

George Primich, representing the Miller Concerned Citizen Group, a group of 600 dues paying area citizens, stated that the discontinuance would have serious adverse effects on the 194 people who board the train daily at Miller. Miller is a part of Gary and Mr. Primich noted that the majority of people who use the South Shore's Miller station earn moderate salaries and could not afford to pay more for alternative transportation. The group formulated its position after the railroad filed its notice of discontinuance.

Ragnar Kummen is 82 years old, does not drive and relies on the South Shore to go to Chicago. Similarly, his daughter in Chicago, depends on the South Shore to visit Gary on weekends. Mr. Kummen asserts that the Chessie knew what it was getting when it bought the South Shore and that despite promises to improve the passenger service, it has tried to destroy it. He thinks the cars are structurally sound and the electrical systems are repairable. He hopes that the Federal Government will take over both freight and passenger service and make something of it.

Elvenor Adams of Gary is an account representative with the Illinois Bell Telephone Company. Ms. Adams used the South Shore daily to Chicago for 6 1/2 years and since her promotion 6 months ago, uses it at least twice a week. Ms. Adams states that the higher salaried managerial positions with the telephone company are in Illinois, not Indiana, and that the South Shore is needed so that people like herself can be eligible for these jobs. Ms. Adams fears that without adequate transportation people may be forced to resign their jobs and join the growing welfare rolls.

Victor Travis of Gary teaches public school in Chicago and has used the South Shore, 5 days a week, for the past 17 years. He has never been late or missed a day because of snow. Mr. Travis has two college age children and cannot afford a second car which he would need for commuting if the South Shore discontinues service. He thinks the South Shore is an asset and that this country has made a mistake by letting our rail transportation get into its present condition.

Ruth Bornstein of Gary thinks the South Shore provides a unique service that is ingrained in the life style of the people who depend on it. She disagrees with the railroad witness who said alternate bus and rail commuter service is available. Hobart is 20 minutes to an 1/2 hour away and she wonders if buses or Conrail is prepared to carry 3,000 more people. She also wonders what happened to the Indiana Regional Transportation Authority which was set up 5 or 6 years ago to deal with the South Shore problem.

Carolyn Gerlich of Gary is an assistant treasurer for Chicago Federal Savings and Loan and has been using the South Shore for 18 years. She is the sole source of income at home and depends on the South Shore to maintain her job.

Paul Eley, a Gary businessmen, thinks the South Shore should be commended for keeping the service going as long as it has over the severe competition from the expressways. He spoke for people like himself who use the railroad occasionally to go into Chicago and find it the most convenient and energy efficient method.

Edith DaKich, a high school teacher in Merrillville, thinks the economic hardship caused by discontinuance is most important but that it would also damage the quality of life of a number of people who use the service to take advantage of educational or cultural events in Chicago.

Milan DaKich thinks discontinuance would cost him more as a taxpayer because it will mean duplicating what already exists in Chicago and will set back area citizens who want advanced study. Frequent train service is especially desirable for students because of their unusual hours.

Lucy Merriweather of Gary has been commuting into Chicago on the South Shore for 7 years. She wants service continued. She will not ride the Penn Central because they have no accommodations or parking at their stop at 21st and Broadway and she does not want to wait there for a train in the dark at 6 a.m.

Lou Donkle and Mark Croll, two Bethlehem employees, who have chosen to start their careers in this area, spoke in favor of continued service because of the role it plays in the area's economy, quality of life and environment.

Katherine Warrick spoke against the proposed discontinuance for the Gary League of Women Voters. She noted that ambiant air quality readings in northwest Indiana are above the 1975 Environmental Protection Agency Standards and the benefits of encouraging people to use the train to visit the Indiana Dunes National Lakeshore. The League's studies show that the South Shore helps meet the transportation needs of low income individuals and families, people who do not drive and one-car families with two- and three-car needs. It believes the railroad is an excellent foundation on which to build a transportation system that will serve people well in the future. The

League began to concentrate on the South Shore's plight after hearings were announced aand admitted that unfortunately it does sometimes take a crisis to focus attention on particular problems.

Robert Farag of Gary is an employee of the United States Department of Commerce in Chicago and has used the South Shore for the past 4 months. He used to drive his mother to the train 10 years ago and observed that then there were many lawyers, accountants, advertising executives, and other professional people using it. Today it is used by secretaries, bookkeepers, and store clerks. These people need the service just as much as the people who used it years ago but they do not have the influence to push their ideas across. He thinks commuters have put up with a lot because they have no choice. He is critical of the railroad's lack of planning which has resulted in today's predicament. He would like to see a joint effort of Government and the railroad, perhaps using a public works bill, to revitalize service.

Attorney Gregg Reising of Gary served as State Representative from the 6th District for 1974-1976. During that time the South Shore never contracted him about its problems. From his exposure to public opinion he believes there are six main opinions about the South Shore: (1) The South Shore has been discouraging passenger service because the freight traffic was more lucrative; (2) The service on the South Shore is poor; (3) There is a great need for the service; (4) The service is necessary for emergency transportation; (5) The service will be more needed in the future because of energy shortages and congested highways; and (6) The South Shore has not done enough to improve its services and should be made to improve before it is given taxpayers' money.

Mr. Reising believes service should continue because the Department of Interior expects that the Dunes National Lakeshore Park will attract approximately 5 million passengers a year who must have transportation both to and within the park. Without the South Shore's services additional parking facilities would have to be constructed which would be injurious to the Dunes. Also, the problems of our cities are directly related to transportation and the only mass transportation access available to downtown Gary and Miller is via the South Shore. He does not think it is realistic to expect that the State of Indiana will "bail out" the South Shore and he agrees with that position. He thinks corporations have to engage in some money losing endeavors and cites, as an example, the cars the automobile manufacturers have to ruin running safety tests. Also there is a possibility the South Shore could make money if service and equipment improved.

Agnes Perkins moved to Gary from Chicago and she says she needs South Shore service. She commuted on it for several years and now uses it for shopping in Chicago, her husband uses it 5 days a week to get to his job in Chicago, her son uses it occasionally, and she knows many people who need it to get to work. She does not want her husband driving into Chicago because it is dangerous. She has tried Penn Central service but the connections were not as good. If service stops, she and her family will miss it.

HAMMOND

Over 40 witnesses testified at Hammond, most of whom are daily cummuters.

Hammond Mayor Edward J. Pocholski admitted that his top priority is initiating city bus service. Hammond is the only city in Lake County that has no local buses. The city also wants South Shore's service continued. Mayor Pocholski believes the Lake

County "head tax" passed January 3, 1977, will produce between $2 and $2.5 million to help finance a city bus system and to supply the local matching funds requirement for the South Shore. In addition, the Mayor is promoting an automobile bill in the General Assembly which would provide funds to aid public transportation. The Mayor complained about the small amount local Government gets back out of each dollar paid by Hammond taxpayers in Federal and State taxes.

Area commuters from Hammond, Munster, Highland and Griffith use South Shore service primarily to go to Chicago or Gary to work. Cessation of rail service would result in severe hardship for these people who would be left with no alternative public transportation. Additionally, the discontinuance would result in increased highway congestion and pollution. Because of its location, Hammond has large numbers of people moving through its streets on their way to the steel mills and oil refineries and Mayor Pocholski is concerned that added traffic will do more damage to the city's streets.

Marion Laud of Hammond is employed in Chicago and has used the South Shore 5 days a week for the past 13 years. If the service is discontinued, Ms. Laud would be forced to retire before she would like to because she will not drive the heavily traveled highways to Chicago. Ms. Laud believes that she could get alternative transportation by driving to Harvey or Hegewisch, which is approximately 5 miles from her home, but that she would encounter difficulty in finding parking. She says that the current fares on the South Shore are too low and that she would be willing to pay more for the service.

Ray Morrison of North Hammond has used the South Shore 5 to 6 days a week for the past 26 years to go to Chicago. He spoke for himself and six other people who work from 4 p.m. to 12 a.m. and take the 12:45 a.m. train home, along with approximately 40 other passengers. The Greyhound bus from Chicago to Hammond does not leave until 3:30 a.m. Mr. Morrison has driven to Chicago but was involved in a 3-mile traffic jam and does not desire to drive again. He purchased a home in 1951 in Hammond because of the availability of public transportation. If the South Shore discontinues service and there is no alternative public transportation, he might have to sell his house and move closer to work. He will first try to drive to Hegewisch because he understands the Illinois Regional Transportation Authority has proposed instituting a commuter bus service from Hegewisch to Chicago; however, he does not think there is adequate parking facilities at Hegewisch.

Mark Entrop of Hammond has commuted to Chicago on the South Shore 5 days a week for the past 2 years. Other than jobs in heavy industry, most Hammond area residents must go to Chicago for work. Without the South Shore service, many people would be forced to either give up their jobs or move to Chicago. He compared the transit time from Hammond to Van Buren Street via the South Shore of approximately 30 to 40 minutes with the same trip on the Chicago Transit Authority which would take approximately 2 hours and involve driving to Illinois and taking a CTA bus to 63rd Street and taking the rapid transit to the Loop. Driving to Hegewisch would take another half hour to get to downtown Chicago. The bus to Chicago which originates at Munster and stops at Hammond is designed for people with 9 to 5 jobs and would be of no help to those who work odd hours. Mr. Entrop does not think the South Shore's problems are its fault, rather they are the fault of the Government agencies which have not contributed public money for the service. It appears to him that people in northwest Indiana do not have sufficient influence with their Government to form a district to provide funds for the South Shore.

Paul Kaleihege of Hammond has used the South Shore 5 days a week for the past 20 years. He takes the 7:15 a.m. train to Chicago and returns on the 3:30 p.m. train. Service is said to be satisfactory and there is usually a seat available for everyone. He purchased his home close to the South Shore station in reliance on continued service. If service is discontinued, he will have to sell his home and move closer to his job at a cost to him of $5,000 to $10,000. He does not think buses are a feasible alternative because of the traffic congestion. He suggests that the C&O purchased the South Shore knowing that the passenger operations were being run at a loss and it should not now be allowed to reap the benefits from the South Shore freight business without accepting the passenger losses. If the South Shore wishes to go out of business, he thinks it should sell the freight operations and turn the money over to the commuters, who will suffer. He favors the expenditure of public funds to keep service going.

Mike Olszanski spoke for Local 1010 of the United Steelworkers Union. He stated that Union members and their families use the South Shore to go to work, to attend various colleges, and to attend cultural activities in Chicago. He believes that the people who would be harmed most by the discontinuance would be the poor and the elderly who do not have automobiles and that the South Shore owes a duty to the community that has supported it in the past, to furnish good, fast, and reliable service. Mr. Olszanski mistrusts corporations who beg for Government subsidies but he does not oppose subsidies for the South Shore. However, if public funds are given, the carrier should be made to open its financial records to public inspection and the subsidy should not continue if the carrier begins to make a profit.

Sylvia Troy, of Munster, is a conservationist and was president of the Save the Dunes Council for 10 years. She has used the South Shore about once a week for the past 20 years. She thinks it would be absolutely outrageous if the Commission allows the discontinuance because every transit study insists that public transit is the way the country has to go. She mentioned the energy shortage and that the area between Chicago and Detroit is predicted to be a continuous megalopolis. She insists that the carrier has discouraged passengers in every possible way: by failing to advertise, cutting back on service and by attempting to raise fares. The alternative to the South Shore is driving on I-94 which she claims is "nothing but a speedway for trucks." A friend counted 900 trucks one Friday from 8:10 a.m. to 9:10 a.m. between Chesterton and the Loop. Northern Indiana has few amenities and eliminating the South Shore would deny the public easy access to Chicago. Bus service is not a reasonable alternative because it pollutes the environment. She thinks the new national park would be irreparably harmed by the cessation of service because millions of people who visit the park will be forced to drive which will necessitate destroying much of the parkland for parking lots. She favors Government subsidy and is against any further fare increases.

Donald L. Lindsey, chairman of the Illinois State Legislative Board, Brotherhood of Locomotive Engineers, spoke in opposition to discontinuance and in favor of subsidy.

James J. Pacholski of Lansing, Ill., and Melaine Smith of Crown Point, Ind., mentioned 77 to 80 Pullman employees who depend on the South Shore. Pullman has closed its large plant in Michigan City but still maintains a graphics department there. It also has facilties in Hammond and Chicago. The employees are concerned about increased traffic congestion and pollution and say they would suffer serious hardship if they have to commute in private automobiles or car pools or if they are forced to relocate.

Frank Berzinis of Hammond is retired. He thinks train travel to Chicago is safe and the community will lose if service is discontinued. Ben Jarchow of Calument expressed similar views. He believes that energy conservation is another point to be considered.

Tom Bozikis, president of the Northwest Indiana Chapter of the National Federation of the Blind, commutes daily on the South Shore from Hammond to his job in Gary. He believes the railroads have been able to manipulate the Interstate Commerce Commission for years and he hopes the Commission has become more consumer oriented. Mr. Bozikis states that many blind people depend on the South Shore to get to work as well as for social and cultural activities. Existing bus service for Michigan City, Hammond, and Gary and the three buses a day each way between Hammond and Chicago are inadequate.

Merlye Borchardt of Hammond works in Chicago and has used the South Shore 5 days a week for the past 40 years. She is convinced that discontinuance will work a very definite hardship on a number of people and will inconvenience a lot of people. She has investigated alternative public transit and it consists of buses. The three commuter buses to Chicago in the morning and the three returning in the evening are already filled to capacity. The RTA bus system provides service Monday through Saturday but not after 9 p.m. The closest stop is 1 mile from her home but there is no parking available. Without the South Shore, there will be no service on Sunday or for people who want to attend cultural activities at night.

Eugenia Anderson of Hammond is a professional musician and is president of the Musicians Club of Women. She uses the South Shore from one to four times a week to travel to Chicago on business, for professional gatherings or to attend the symphony opera or other musical offering. She has traveled by train since 1951 and considers herself a South Shore fan. The service is excellent, the personnel polite and it is almost always on time. She thinks it would be a great tragedy if it ceases to transport passengers because many people like herself who can drive but do not want to drive into the city would not be able to take advantage of the cultural and educational happenings in one of the most wonderful cities in the world located just 20 miles away.

Edna Cinotti of Hammond has used the South Shore for 40 years to commute to her job at 10 West Randolph Street in Chicago. If service ends, she might have to retire but she does not want to do that yet. She says it has been a wonderful train through the years, it has little problems occasionally but all in all she does not know what people would do without it.

Attorney John F. Prusiecki of Hammond has commuted daily on the South Shore to Chicago since August 1972. If he is forced to drive to Chicago, it will cost him $94 more a month or $1,062 a year and he will lose 20 to 25 hours of productive work time. Buses and car pools are not suitable because his working hours are irregular and he normally leaves Chicago after 6 at night. He noted that the Indiana suburbs of Chicago have a lower economic status than the Illinois suburbs and have a high concentration of minority residents and women. If discontinuance occurs, people who have had less advantages economically, racially and sexually are going to bear a heavier burden. Alternatives include moving to Illinois or quitting one's job. Both of these are unpleasant. Those able to keep their homes and jobs will clog the highways in cars or buses and waste precious fuel. This will only aggravate the situation because even now it is not often that the sky in northwest Indiana is clear and clean enough at night to see the stars. The South Shore provides a way that young people from the area can better their economic condition by finding a job in Chicago. It has also made educational opportunities available at a lower cost because students are able to live at home and commute.

Attorney Prusiecki cits *Southern Railway Co.* v. *North Carolina*, 376 U.S. 93 (1964) where the court stated:

> In cases *** involving vital commuter services in large metropolitan areas where the demands of public convenience and necessity are large, it is of course obvious the Commission would err if it did not give great weight to the ability of the carrier to absorb even large deficits resulting from such service.

He understands the Chessie System was after the South Shore's profitable freight traffic when it acquired control. However, the burden of the passenger operations would have been reflected in the price of the stock and to allow the discontinuance of passenger service now would result in a windfall to the Chessie. He thinks it is appropriate to consider the Chessie's over all profitability and noted that the Wall Street Journal of January 4, 1977, said Chessie had record earnings in 1976 of $102 million. The claimed passenger deficit of $2.4 million would offset other Chessie earnings so it is really only $1.2 million with the result that the South Shore's passenger losses amount to only 1.2 percent of Chessie's 1976 earnings.

Attorney Prusiecki charges that the South Shore has been intentionally downgrading its service to discourage passengers and to build a case for discontinuance. Trains are often late, the cars are filthy and nothing has been done to improve the cars or the service. Also in spite of at least 50 percent inflation, fares have not been increased since 1971. It seems obvious that the carrier avoided an increase so it could show the Commission they were losing large sums of money. He thinks recent and uncharacteristic improvements at the East Chicago and the Randolph Street stations were made to increase the passenger deficits, lull the passengers into passivity or impress Government inspectors.

Nick Angel, of Munster is a Lake County Commissioner. He admits that northwest Indiana has a major transportation problem that can only be solved by a cooperative effort of everyone involved. He is a former Indiana legislator and knows that the South Shore has been lobbying for support since 1965. He advocates spending some of the county's revenue sharing funds to keep the railroad going, providing other localities do likewise. This area enjoys the benefits of Chicago. It adds to the culture, the education and the commercial and industrial life. The link is the South Shore and he does not want to lose it because some self-serving politician says let someone else pay for it.

Jane Hall presented the position of the League of Women Voters in Lake County against discontinuance. The League noted the workers who would be without transit, the congested highways, the area's unemployment rate approaching 8 percent and air pollution and urged the wise use of resources in the public interest.

Wanda Pitzelie of Griffith commutes on the South Shore to Chicago 5 days a week. Her husband is a part-time student and her job provides half the family income. If service ends, she would have to find a job in the area. The prospects are slim and she would get paid less. They have one car and it would not be available to her to drive the 20 to 25 miles to Harvey, Ill., to catch the Illinois Central Gulf.

John Young of Chicago, president of the Avalon Trails Improvement Organization, a civic organization representing 550 members of the Hegewisch area, used the South Shore prior to the fare increases but has switched to a car pool and only uses it now periodically. He is appalled at the Interstate Commerce Commission for allowing the situation to reach the present stage by allowing fare increases in the early 1970's and service reductions. He criticizes the Commission for again sitting in judgment without presenting effective recommendations or legislation to ward off the crisis. He sees the situation in terms of a chess game where people lose no matter what the outcome.

Richard Kalamba of Burnham, Ill., reported that he and his wife ride the train between Hegewisch and Chicago 5 days a week and discontinuance would cause them hardship. South Suburban Safeway Bus service is available but the buses are full when they arrive at their stop. Mr. Kalamba said it is much more difficult standing on a bus than on a train. He is opposed to driving because of the overcrowding on the Dan Ryan Expressway and the inefficiency involved.

Ethel Lape of Merrillville is an administrative executive secretary in Chicago. She has used the South Shore daily from East Chicago since 1948 to commute to work. Her only alternative would be to drive into Chicago. She noted that many other people really need the service like the elderly people who are not able to drive and who depend on the train to take them into Chicago for medical attention and young people who need it to commute to school and who use it in the summer to get to recreational areas.

Onufry Popyk, Jr., of Griffith uses the train 5 days a week. He believes discontinuance would violate his constitutional rights because it would give money preference over his right to life, liberty and the pursuit of happiness.

Judy and Warren Black of Munster have a son with a learning disability who has used the South Shore since 1971 to go to school in Oak Park. At various times three other children traveled by train with him. Their son has his driver's license now but they do not want him driving on the busy highways to Chicago. Both Mr. and Mrs. Black used the South Shore for schooling. They believe in mass transit for the area and think it is important to find politicians who share this conviction.

George Conner is a tax accountant in Chicago and has used the South Shore 5 days a week since 1965. When he started riding the train the service was excellent but it has deteriorated in recent years, so much so that 4 years ago when he purchased a new home he considered relocating. However, he bought a home in Munster because of his family's ties to the area. At this point, he would suffer serious hardship if the service were discontinued and he were forced to move to Illinois. He does not think that the South Shore should be made to stay in an unprofitable business but there has to be a solution because there is no practical alternative for getting between the area and the Loop. He noted that when fares increase passengers drop off considerably and he is opposed to the 200-percent fare increase he read about. The Illinois Central Gulf is 15 or 16 miles away but has no parking available.

Jonathon Janotte is a senior at Highland High School and testified on behalf of the Highland Youth Commission, a group of seven students appointed by the town board to represent youth in the community. He is enrolled in a work study program at the Chicago Mercantile Exchange in Chicago and uses the train 5 days a week. Many students who live in Indiana and attend college in Chicago would be seriously disadvantaged by the cessation of South Shore service. For example, he plans to attend Loyola University in Chicago beginning in the fall of 1977 but may not be able to do so if service is discontinued.

Edward Dvorshak of Hammond has ridden the train into Chicago from East Chicago 5 days a week since 1966. He complained that he is only able to get a seat half the time going in and never coming back until he started to board at Randolph Street. He remembers reading about promises by the Chessie that it would upgrade service if it received permission to control the South Shore. Just the opposite has happened. Cars are dirty, schedules are changed, trains are late, and stations close at 2 in the afternoon. Fare increases have caused the number of passengers to drop. He has tried driving to Chicago and it is dangerous and expensive and he could not possibly do it every day.

Ann Norris of Munster uses the train 5 or 6 days a week from Hammond to Randolph Street. She has been doing this for 10 years when her employer American Steel Company transferred many people from Hammond to Chicago. Using a bus would get her to work later than she would like. She could drive to Homewood but there is no parking there and driving to Chicago is expensive and hard on her nerves.

Martin F. Costello of Burnham, Ill., has traveled the South Shore daily from Hegewisch to Randolph Street. He urges cooperation of politicians, unions and the railroad to keep the service going. He has tried the new Illinois Central Gulf cars and does not like them because they are plastic and sterile. He prefers the old South Shore because it has soul.

Richard Reinoso of Hammond says his wife has been using the train since 1949 and his daughter has used it for 3 years. He wanted the Commission to know that it is the same story for everyone in the audience because they think Hammond will become a depressed area without service and it will work economic hardship on their families. He thinks the C&O is doing well financially and it is not fair for them to come in and take the lucrative South Shore freight business and eliminate passenger service. To him the issue is whether the C&O can afford to continue passenger service and he thinks it can.

Kathy Kennedy of Hammond uses the South Shore 5 days a week. She is single and does not own a car. If service is discontinued, she will have to take a cab probably to Calumet City. There are few jobs in Hammond so she has to get to Chicago.

Attorney Nona Doyle has homes in Hommond and Michigan City. She does not think a railroad should be able to reap the benefits of its freight traffic without complying with its moral and public responsibility toward the citizens of the community in terms of passenger service. She recommends that the Government take over the South Shore's freight service and use the profits to subsidize the passenger service.

EAST CHICAGO

East Chicago Mayor Robert A. Pastrick stated that discontinuance would result in lost jobs, traffic congestion, and heavy losses to the region in terms of salaries. He considers the South Shore an intergral part of Lake County's mass transit system. East Chicago uses revenue sharing funds to subsidize its bus system at a cost of $250,000 a year. These buses provide free service to the South Shore station. In October 1976, the mayors formed the Indiana Mayors Metropolitan Association to take a stand before the legislature on mass transit and other issues. The Mayor read a statement in opposition by Indiana Representative Tony Zaeleski.

The presentation of the Northwest Indiana Regional Planning Commission (NIRPC) was made by Messrs. Colin Mackenzie, Ron W. Randham, and Timothy P. Galvin, Jr. All three individuals are unpaid members of NIRPC. NIRPC is one of four Indiana agencies eligible to apply and receive Federal and State mass transportation funds. It is about 4 years old, its predecessor organization was the Lake-Porter County Regional Planning Commission which was established in 1966. It is made up of 25 representatives from Lake and Porter Counties and has a staff of 50 people. It is responsible for developing and implementing comprehensive plans.

Mr. Mackenzie maintains that moneys to fund the operating deficits of the South Shore exist today and go unspent because the railroad failed to sign a section 13(c) labor agreement. The amount in question is $968,000 available over a 2-year period. On December 17, 1976, NIRPC notified the South Shore that it was unable to sign the agreements based upon the advice of counsel. It contends that railroads traditionally sign them. NIRPC maintains that the history of public support for mass transportation in Indiana goes back to 1968 when the South Shore and the Regional Planning Commission jointly prepared a capital grant application for 30 new self-propelled, air-conditioned, electric rail passenger cars and modernization of electrical system in passenger service facilities. The $10 million application was approved by the Urban Mass Transit Administration (UMTA) in 1971 but failed because neither the South Shore nor the Chesapeake & Ohio would put up the local match of $3 million. This was in spite of statements by officers of the South Shore, particularly past president and general manager Mr. James B. McCahey, Jr., on February 26, 1971, that the railroad would provide the necessary local funds. NIRPC takes from this that the South Shore is not committed to providing efficient, viable transportation service to the people of this region. UMTA withdrew and canceled the grant on September 25, 1975. The result is that in 1976 the area is faced with the fact that it will cost $39 million to buy what $10 million would have bought in 1971. NIRPC disagrees with Mr. Dudley, South Shore president, that the 1971 grant application was delayed because of further study of the mass transit picture, including a statement of the effect of the new equipment on the environment.

The Indiana Public Transportation Advisory Committee, the public transportation advisor to Governor Bowen, recommends that Indiana consider preserving and upgrading rail mass transit services with special attention to commuter rail service threatened by discontinuation. In a letter dated November 16, 1976, Governor Bowen stated "I have indicated that I would support the state's sharing in the cost of the local matching money needed to secure a Federal grant to provide new equipment. If that is to materialize, strong support from the four counties must be voiced in the legislature. In addition, local governments in the counties affected must be prepared to make a similar contribution, both with regard to the equipment and toward helping defray a part of the operating losses over the long run."

In addition to serving some 3,500 commuters daily, the South Shore provides significant business, personal, school and shopping trip purposes, and provides a way to travel for very significant numbers of elderly and handicapped people. NIRPC's projection shows a 50-percent increase in trips in 1995 plus a greater linkage of local bus services with the South Shore. More particularly, it estimates an approximate 33-percent increase in passenger miles traveled on the South Shore over the next 20 years. It is critical of the South Shore for not attempting to improve its car fleet and disagrees strongly that any reasonable alternative common carrier service exists. Airplane travel is available between Michigan City, Valparaiso, and Chicago but that is limited and very expensive. Conrail service will probably be discontinued under the provisions of Public Law 94-210. NIRPC notes the effect this discontinuance would have on the area's serious air quality problems and increased energy consumption.

NIRPC notes that the Lake County Council passed the employment head tax on January 3, 1977, and revenues from this tax are part of the solution to the South Shore's problems. It sees as a crucial issue the railroad's operating efficiency and its cost allocations. It guarantees that no public funds will be spent on an inefficient operation and without a full, equitable accounting of its operating expenses.

Mr. Randham stated that he had contacted Conrail personnel by letter on January 4, 1977, stating that the Northwest Indiana Public Transportation Authority (NIPTA) of which he is chairman would not be able to provide the required subsidy to continue service. NIPTA cannot levy a tax, that must be done by the county council. In NIPTA's case this would be the Lake County Council.

According to Mr. Randham, without South Shore service, almost every automobile route to Chicago west of Ogden Dunes would be congested during the peak hours. Possibly there would be some deterioration in the commercial urban areas surrounding the South Shore stations in Miller, Gary, Hammond and East Chicago, some 900 riders are likely to relocate, seek new employment, or are undecided as to which alternative they will choose and 169 South Shore employees will lose their jobs. Employment and income losses to the area's economy could come to about $13.5 million annually. It is estimated that a total of 1,000 people may lose their jobs amounting to $15.5 million in lost annual income and diminishing the region's annual retail sales by $4.2 million, decreasing expected annual bank deposits by over $5.1 million and jeopardizing the viability of 21 retail establishments. Also, discontinuance is expected to severely impact northwestern Indiana's opportunities to diversify its economy. Another major consequence would be on the region's air quality which has already been designated by the United States Environmental Protection Agency and the Federal Highway Administration as a priority one area for carbon monoxide and oxidants. Also, the State Board of Health has noted that rail mass transit must continue to expand in the region or the transportation plan must be revised to meet national standards. If you expect the worst, which would be that 3,500 automobiles would replace the South Shore's service, NIRPC estimates a 7-percent increase in carbon monoxide, a 9-percent increase in hydrocarbons, a 4-percent increase in nitrogen oxide, and a 3-percent increase in sulphur dioxide or an increase of over 6,860 tons of pollutants per year. Again, if all riders drive automobiles, NIRPC estimates a 100-percent increase in energy use over the South Shore's present consumption. This would mean a new need for approximately 585,000 additional gallons of gasoline a year.

NIRPC has also analyzed three alternatives which include purchase of new automobiles, establishment of a van pooling program and the use of buses. Energy consumption is increased in the auto alternative and the annual operating expenses are three times greater for the auto and less for both the van pool and bus alternative. The capital cost to replace the South Shore's equipment is $39 million, pollutant emissions totaled 287 tons per day and energy consumption is 1,520 equivalent gallons of gasoline a day. Capital cost for the automobile, van pool, and bus system alternatives are $210 million (which includes $70 million for adding a lane to the Dan Ryan Expressway), $90 million and $82 million, respectively. NIRPC expects annual pollutant increases of 13 million, 1.6 million, and 226,000 pounds with the replacement of the South Shore by either the auto, van pool, or bus alternatives, respectively. Energy consumption changes are not as dramatic but the automobile alternative would double gasoline consumption by over 1,500 gallons per day. Operating expenses for the automobile alternative ranges above $12 million per year compared with 1974 railroad expenses of over $5 million. The van pool and bus alternatives have lower operating expenses but when capital and operating costs are combined, the South Shore's costs are still far less.

NIRPC recognizes that the Interstate Commerce Commission under section 13a(1) has an April 8, 1977, deadline in taking action in these proceedings; however, it sees the provisions and mandates of the 1969 National Environmental Policy Act as superseding any deadline contained in the Interstate Commerce Act. It requests that any action be postponed pending completion of public hearings and review of the Commission's Draft Environmental Impact Statement.

NIRPC would like to see the purchase of 38 new single-level 98-passenger or 26 new bilevel, 156-passenger, air-conditioned electrically propelled commuter railcars to be operated by the South Shore. The expense will be met by an 80-percent section 3 Urban Mass Transit Authority funds and 20-percent local and State funds. Some 18 percent of the 20 percent or 3.6 percent of the total grant will be paid for by the Illinois Regional Transportation Authority, 41 percent of the 20 percent or 8.2 percent of the total will be paid by the State and an equal amount of 8.2 percent of the total grant will be paid by the four Indiana counties serviced by the railroad. The amounts from each county would be determined by a formula based on ridership, operating expenses, seat miles, or some other service indicators. This would mean that something around $39 million or $31 million in Federal funds and $8 million to be shared by Indiana and Illinois and the Indiana counties involved. The $2 million annual operating deficit would also be paid through public and railroad funds. It would have the railroad bearing the difference, if there is any, of the combined public support and the operating revenue and passenger service expenses.

According to material submitted by NIRPC, some $42 million will be spent in fiscal 1977 for highway improvement projects in northwest Indiana. Of this total, the State will provide $6.6 million and the local communities will provide over $4.6 million. All State highway funds are derived from a gasoline tax.

NIRPC expects action by the four Indiana counties, action by the Indiana legislature before the adjournment of this session and the use of other sources of revenue, including special taxes and revenue sharing funds, to make up the local share match for Federal transportation funds. NIRPC cannot view the South Shore's operation as a single system but rather as part of a complete mass transit system for the region and recommends strongly that the Commission refuse the railroad the ability to discontinue service.

David L. Nassau speaking for the East Chicago Merchants Association and the East Chicago Kiwanis Club noted that some 1,600 people utilize the South Shore's East Chicago station daily and that there is no alternative train service and only limited bus service. Both organizations oppose discontinuance. A similar expression was made on behalf of the East Chicago Chamber of Commerce.

Robert L. Foster of Hammond has ridden the train to Chicago 5 days a week for 18 years. He believes Indiana and the South Shore should get together to save service.

Paul W. Elliott of East Chicago has commuted via the South Shore off and on for 7 years. He disagrees with the Commission's Draft Environmental Impact Statement by saying that the 95th Street Dan Ryan Expressway Rapid Transit station is 10, not 5 miles from East Chicago. He does not think it is legal to park there all day. The best RTA station for him would be at 87th Street and it does not have all day parking either.

Minnie Sanders, Coordinator for the Project Area Committee in East Chicago, a citizens' group participating with urban renewal, would like the South Shore's service continued.

William Staehle, deputy administrator of the Illinois-Indiana Bi-State Commission, explained that the Commission is composed of 12 people divided equally between the two States and has the primary function of coordinating matters of interstate significance. It has a staff of three people because it is not responsible for primary planning. In Indiana that is the job of the Northwest Indiana Planning Commission and in Illinois the Illinois Planning Commission and the Chicago Transportation Study. The Bi-State Commission has attempted to organize testimony in opposition to the South Shore's proposal beginning with a meeting it called on December 20, 1976.

Prior to this it directed attention to the issue of nontransportation but this is the first time it focused on the South Shore problem.

George van Til read the statement of the North Township trustee. The township's 205,000 people live in Hammond, East Chicago, Munster, and Whiting. The trustee is an elected official involved, among other things, with relief for the poor and discontinuance might increase this cost to the taxpayers. Mr. van Til thinks the South Shore has discouraged passengers and that its losses are not as great as the railroad claims because it would have to maintain the track for freight even if it stopped running passenger trains.

Milton Ross of East Chicago rides the train to Indiana University in Gary. He thinks the South Shore benefits the economy of the cities it serves and also helps race relations by bringing people together in a friendly atmosphere.

A statement by Indiana Attorney General Theodore I. Sendah, a Lake County native, was read urging continuation of service because it provides an essential economic benefit to area residents.

Willie Collier, Equal Opportunity Officer for the city of East Chicago, knows that many people who use the South Shore hold clerical and secretarial jobs in Chicago. If service is cut, these people will have to go on welfare and the result would be catastrophic for the area.

Ann Kilemen of East Chicago told how her grandson, a Vietnam veteran who cannot drive, uses the South Shore to go to Hines Veterans Hospital for therapy. She also noted that senior citizens have no other way to travel.

William J. Riley spoke for the East Chicago Manufacturers Association, composed of the city's largest industrial plants. He noted that East Chicago contains one of the most concentrated industrial districts in the United States. Over 41,500 people are employed in the city's industrial plants which include Inland Steel and Youngstown Sheet and Tube Company. These labor intensive industries need adequate transportation for their employees to survive. The Association recalls that a Chessie officer pledged before that carrier took control of the South Shore that passenger service would be continued at all times. The Association would like to have that promise honored.

John R. Dobrzynski of Highland has commuted on the South Shore to Chicago for 3 1/2 years to his job in Chicago. He detailed the hardship and suffering involved in relocating, which he will be forced to do, if service does not continue. The other two alternatives would be finding a job in the area or driving. The latter is unsafe, uses critical fuel, and pollutes the environment. He considers the South Shore the only available mass transit in the area. Buses take twice as long even in good weather and traffic congestion is out of sight.

Eugene H. Harvey is critical because he thinks it is wrong that the South Shore spent money for new freight equipment and nothing on passenger cars. He also questioned the lack of advertisements and whether the Chessie gets a tax benefit for controlling the South Shore. He mentioned aid to Vietnam, the Marshall Plan, and kicking the door down at the South Shore station early one morning when his wife and others were standing out in the cold waiting for a train.

Patricia Ferber of Griffith will have no alternative but to quit her job and lose her pension if service is discontinued. She has worked at a Chicago bank for 20 years and will be eligible for a pension in 4 years. To get a bus she would have to drive to Hammond or Lansing and it would take 2 1/2 hours to get to the Loop.

Glenn Griffin of Munster thinks there should not even be a hearing, that it is insane to tell people to use cars when air pollution is at record levels, and that the South Shore is only interested in freight traffic.

Ann Bogucz of East Chicago said she would have to quit her job or relocate if service on the South Shore ends. Her family has one car but even if she had a car, driving is too expensive. Parking near her job in Chicago costs $54 a month which is what she pays for the train. She started riding the train 2 1/2 years ago and could always find a seat, now her chances are fifty-fifty. In bad weather, the train is very crowded. She commented that her family has always paid taxes, she and her brother went to private school, and it would be nice to see some tax money spent on something that counts for them.

Rudy Schneider spoke for Local 1010 of the United Steel Workers which has 17,500 workers at Inland Steel. He thinks the railroad is trying to blackmail the public and the Government by threatening to end service unless a subsidy is given. He would like to see the Government operate the railroads as a public corporation.

Carol Wharton of Griffith commutes to Chicago to her job as an expediter at Blue Cross-Blue Shield. She supports herself and two children. She has managed to stay off welfare for 9 years but this might be the end of it. She has tried unsuccessfully to find employment near where she lives.

Michael Connally, city attorney of East Chicago, contends that bus service between points served by the South Shore is inadequate. He claims service has deteriorated. For example, there is no longer any service from East Chicago to South Bend. He usually drives between those points in good weather because it is more convenient. He thinks service is generally good but the stations are poorly maintained. His wife drives to Hegewisch because the accommodations are better than in East Chicago and the parking is free. He remembers promises by the C&O that it would upgrade service if it took control of the South Shore and he wants those promises kept.

Barbara Hauser of Calumet, Ill., rides to Chicago daily from Hegewisch. She pays $44.60 a month but would have to pay $60 for the bus from Calumet City and there is no parking there. She can get a bus across the street from the South Shore's Hegewisch station. She tried to get a job near her home but there are none at her salary.

Thomas J. Cushing of Griffith uses the train 5 days a week. He teaches art at the college level and could not find a comparable position in the area. He noted the benefits of an electrical railway and how it would be prohibitively expensive to replace. He thinks that Indiana should put up funds to back the South Shore because of the money spent in Indiana by people who use it to work in Chicago. He would hate to leave Indiana because after spending 30 years in Chicago he appreciates the area's quality of life. He was critical of the way people have abused the public areas of the stations and the railroad's security measures.

Janet Florer works at CNA Insurance and has ridden the South Shore for 11 years. She has no complaints about the train being old and dirty so long as it runs. She does not always have a car and cannot afford to drive into Chicago. The buses are too infrequent. The South Shore is the only reasonable transportation for the area and without it she will be forced to quit her job.

Janet Gasperson lives in Hammond and works for the CNA Insurance in Chicago. She tried a car pool but she had to leave home at 6:30 to get to work at 8:45 and after getting out at 5 she did not get home until 7. She would not drive and has tried the bus and found it unsatisfactory.

Thomas Avgeris lives in East Chicago and has ridden the South Shore for 7 years to his job in Chicago. Rather than move out to Portage, he chose a house near the South Shore. If it stops running, he will move to Illinois. He notes that if one designed a type of mass transit operation most compatible with the environment it would be an electric railroad. He was in a car pool for 15 months and had two accidents, four automobile breakdowns, and was in numerous traffic jams.

Thomas A. Pictor, a commuter from Highland, spoke in favor of continued service for himself and his father and stepmother, age 68 and 69, respectively.

Michael Evan of Merrillville, who commutes 6 days a week, spoke against discontinuance. His wife and sister commute 5 days a week.

Louis S. Craig of Hammond has commuted into Chicago on the South Shore for 5 years. He does not think there is any alternative service. Buses are not suited to his irregular hours and he tried driving and found it an awful experience.

CHESTERTON

Michael A. Carroll, special assistant to Senator Richard G. Lugar, read the Senator's statement pledging assistance in expediting Federal assistance once a workable program for revitalizing service is devised and grant applications are submitted. The Senator urges the Commission to heed the positive tide of public support and require the service to continue for at least 1 year.

Representative Floyd Fithian of the 2nd District of Indiana requested that the Commission order the service continued. He cited several factors which could increase ridership including the possible discontinuance of Conrail's service from Valparaiso and the population growth that has occurred in Porter County. He mentioned that discontinuance would severely impact middle and lower income wage earners and could be costly because of extra wear and tear on the highways. It is his philosophy that a Federal Congressman should not tell State or local officials what they must do so he has no views as to what the State of Indiana or the local governments will do or have done to retain service.

Esther Wilson, State Representative of District 6, believes service should be retained. She expects that a minimum of 1,500 people in her district, not counting railroad employees, could lose their jobs. Also, without the service, the large number of visitors expected to visit the new Dunes Park will require costly improvements to access roads and parking spaces.

Pauline Allgrin, a new member of the Porter County Council, pledged that she will do everything she can to see that Porter County takes appropriate governmental action to keep service. She believes service is necessary for county residents to get to Chicago, because of the impact the availability of mass transportation has on land values, for access to the Dunes National Lakeshore, and because public transit lowers highway maintenance costs and auto emissions.

John Morgan of Chesterton is a Porter County Councilman. He explained that the Council voted against joining the Regional Transportation Authority last year but he thinks the action will be reversed and the county will take positive action. He acknowledged that the southern part of the county opposes assistance to the South Shore but some trade off might be possible since they have been given a costly ambulance service. He requested time and noted the county is under some strain because the legislature froze the tax base and because the county does not know how much it will have available in revenue sharing funds.

John Smart, representing the town of Ogden Dunes, which is located between Lake Michigan and the railroad tracks, stated that it is vital to that community that service be continued indefinitely. Some 460 residents have signed petitions urging continuation. The community has 506 houses and 75 residents who commute to work.

John Melchiori presented a resolution of the Town of Chesterton urging the County Council and Commissioners of Porter County to enter into agreements and arrangements with other counties serviced by the South Shore to aid it financially and that the Interstate Commerce Commission order the service continued.

Anna Lippman of Valparaiso introduced petitions signed by 530 citizens who want service retained. The petitions were gathered by two people in 2 1/2 days.

Nancy F. Wood of Valparaiso has commuted into Chicago on the South Shore for 30 years. She boards at Ogden Dunes. Discontinuance will cause her severe hardship and will isolate communities and reduce property values.

Vincent J. Shaulis, president of the Board of Trustees of Beverly Shores, a community of some 1,000 residents along the railroad right-of-way, expressed the concern of that community, a majority of whose residents commute on the South Shore, if service is discontinued. He also quoted Governor Bowen's State of the State address that he would support giving State money to local governments to help them match Federal grants.

M. David Schaeffer spoke on behalf of the Association of Beverly Shores Residents and the Town Board and read a statement from the American Friends Service Committee. Mr. Schaeffer opposes the discontinuance and the railroad's trackage abandonment application. Mr. Schaeffer quoted from the South Shore's brief in Finance Docket No. 23566. He believes it shows that the C&O in accepting control of the South Shore also took on the obligation of modernizing the line and running it, losses notwithstanding. The same point was made by Dr. Robert Franklin, a commuter living in Beverly Shores. He believes that the main reason South Shore trains are almost always late is that the railroad's policy is to give preference to freight trains.

Calvin P. Jingst of Beverly Shores is a commuter and spoke for the Beveral Shores South Shore Transportation Committee. He believes the public has been lulled into inactivity by the South Shore and by statements of the Chessie when it obtained control in 1967. Other reasons for continuing the service include the effect on energy use and the damage to the environment outlined in the Commission's Draft Environmental Impact Statement.

Jeanne Sprague, a member of the Dunes Acres Town Board, stated that the town has protested the discontinuance in every way it can and has supported a regional transportation authority.

Hebert Reed of Chesterton, an engineer and an architect, recognizes that passenger service is dependent on subsidies from the freight traffic. In his opinion, profits from freight will continue within the foreseeable future because of traffic to the Northern Indiana Public Service Company and Bethleham Steel. Mr. Reed contends that the Chessie obtained public support for its control of the South Shore by promising to maintain and upgrade passenger service. Using the same tactic, the Chessie reduced opposition to fare increases and reduced train service. Once these ends were accomplished, the Chessie reneged on its promises to the public and is now trying to rid itself of the service. He disagrees with the railroad's estimate of the cars' safety and believes that the service is certainly safer than driving and in the event of an accident, he would prefer to occupy a South Shore car, particularly one with strengthened end posts, than the new Illinois Central Gulf cars. Mr. Reed has been a regular commuter, Tremont to Randolph Street, since 1959. His son also commutes to the University of Chicago and his father commuted on the train almost from the day service began. Discontinuance would cause him considerable financial strain. In his opinion, it would be irresponsible to permit abandonment of an existing mass transit line.

John Laue spoke for Save the Dunes Council which is concerned with the impact of discontinuance on the Indiana Dunes National Lakeshore. In 1966, Congress authorized establishment of a 5,660-acre park and 3,660 acres were added by

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legislation in October 1976. The park's first major recreational facility will open in April with a $1 million bathhouse and interim parking for 650 cars and 30 buses at West Beach. According to Mr. Laue, original plans called for a 2,000-car parking facility; but the National Park Service shifted from the auto to mass transit to, from and within the park. It is the only National Park that has an electrified railroad running through it. The Council believes termination of the service would have an adverse effect on the environment and the delicate ecological balance unique to the Dunes and public access to the park which expects 15,000 visitors each day at West Beach during the peak summer months. Charlotte Reed, executive secretary of the Save the Dunes Council, also spoke for retention of the service.

Howard B. Olin spoke for the Lake Michigan Region Planning Council, a four-State organization of architects and planners dedicated to the ideals of regional planning, and introduced a Council-passed resolution opposing discontinuance. Mr. Olin has been a daily commuter from Beverly Shores for 20 years and has watched the service deteriorate. He offered several criticisms of service and is shocked that where San Francisco is spending $2-$3 billion dollars to develop an inferior service, this area cannot raise three quarters of a million to keep the South Shore going.

H. J. Steiner, representing the Porter County Chapter of the Izaak Walton League, expressed concern that without rail passenger service more valuable lakeshore acreage would have to be used for parking.

Harold N. Oberg of Chesterton, a commuter of 30 years, needs the service to continue his business in Chicago. He contends that autos and highways notwithstanding, the South Shore is to blame for the service's present deplorable condition. He does not share the opinion that the public is to blame. As he sees the situation, the public is now being called upon on more or less of a moment's notice to put the pieces together in a matter of 4 months when the owners have taken 30 years to systematically destroy it.

Mark William Borleshe, a student of transportation at Indiana University, believes the railroad has explained adequately that it is losing money on passenger service but that other consequences such as employment, highway expansion, pollution, energy, and land use outweigh such financial benefits.

Lawrence E. Quigley of Chesterton has been riding the train daily for 9 years. He wants service continued because he cannot afford to drive and it is pollution free, relaxing, and safe. He commented that there have been less breakdowns and delays in the last couple of years, with the exception of last week and the bad weather.

Pat Moody of Chesterton is concerned with environmental protection and has been working with the Committee to Save the South Shore. She reported that State Senator Dennis Neary introduced a bill (Senate Bill 368) designed to bring about a regional transportation authority. Ms. Moody commutes daily to Chicago and needs her job to support her children.

Dr. Lucia E. Tower Troy of Beverly Shores is healthy and working after commuting on the South Shore for 40 years. She believes the railroad has made every effort for 20 years to antagonize, discourage, and alienate possible riders but that service must be saved for the sake of the further economic and cultural development of northern Indiana.

Martha Lois Wills, president of the Porter County League of Women Voters, spoke against discontinuance because transportation is a basis service which should be available to all, it eliminates the number of private autos thereby reducing pollution and studies indicate future population growth for the county.

CHICAGO

Chicago Mayor Michael Bilandic thinks it would be a major step backward to discontinue service. Besides economic hardship to thousands, discontinuance would cause more pollution and congestion. The South Shore is part of a regional system and must be preserved. The Mayor requests that the Commission deny the railroad's request so there can be more time to complete arrangements for financial assistance.

Milton Pikarsky, chairman of the Regional Transportation Authority of Northeastern Illinois (RTA), stated that loss of South Shore service would have a severe negative impact, not only to those taxpayers who travel on the South Shore to reach their jobs but to the future of transportation in the region. The RTA was created in May of 1974 and since its inception has invested almost $1.5 million in South Shore operations. The RTA is providing 18 percent of the South Shore's operating deficit, a figure based on the proportion of riders with both origins and destinations in Illinois. The RTA engaged a major accounting firm to identify items that would be segregated for the use of passenger service to determine whether there were any railroad practices which would put an undue allocation on passenger service rather than freight service. The procedures recommended by that accounting firm are used by the RTA in its subsidy agreements with private commuter railroad lines.

The RTA has purchase of service agreements with all of the major commuter railroads serving Chicago. He noted that several carriers, Rock Island, Burlington Northern, and Illinois Central Gulf, are purchasing new commuter cars under Federal funding arrangements where the local share comes from the Illinois Department of Transportation which he said was the general way the local share requirement was handled today. Mr. Pikarsky does not consider public transportation wholly a responsibility of the railroad.

While public transportation has not received the level of Federal funding going to highways, Mr. Pikarsky believes the amounts appropriated for transit are increasing. He has been involved in discussions with Indiana officials about the South Shore since the late 1960's and considers that incremental progress has been made. He believes local commitment essential for sucess but it takes time for any region to build workable mechanisms to mesh with the machinery of the Federal level and he has no doubt this will be done in the case of the South Shore given time and consistent effort by those concerned. As regards the approximately $1 million worth of repairs required to repair and refurbish the South Shore passenger cars just to keep service going, he estimates that without service the region would lose at least 30 to 100 times that amount in incomes of those who depend on service. Also rather than look at one item, it is necessary to look at the total cost to the community. The RTA has made it clear that they will contribute 18 percent of the local share that is required toward capital improvements. Under Federal programs the Federal Government can provide 80 percent of the cost of new equipment and 50 percent of operating losses.

In the event the South Shore does cease operations, the RTA has a very unsatisfactory solution to cope with its responsibility for public transportation in the Illinois area which would be to bus people from Hegewisch to a station on the Illinois Central Gulf. He noted that no other reasonable alternative to the South Shore exists for the nearly 2 million riders who used it last year to commute between Chicago and northwestern Indiana. Despite a decline in ridership, the projected 50-percent population growth of the area during the next 20 years indicates increased ridership and the need to improve public transportation facilities on a large scale. It has been proven time and time again that, in the long run, it is infinitely less costly to maintain and improve transportation services than it is to live without them. Loss of the South Shore would put upwards of 2,000 additional cars on the crowded expressways tomorrow. Presently the Dan Ryan Expressway handles between 175,000 and 200,000 daily and it and the Indiana Tollroad-Chicago Skyway system are already heavily congested.

The South Shore is an extremely efficient use of energy resources. Electricity produced in this area uses only about 10 percent oil while the rest of the power is produced by coal and nuclear sources. He believes that systems that are powered electrically should be given special priority because of the special benefits they provide. Despite its age and condition, the South Shore railroad is, in some respects, a model for the wise use of energy and this alone, in his opinion, is more than sufficient to justify its continued commuter service. He noted that the Bureau of Census acknowledged that the South Shore is a regional issue when it established the Standard Metropolitan Statistical Area encompassing Chicago and Lake and Porter Counties, Ind. In this Nation we have only begun solving transportation problems in areas where local political boundaries do not coincide with the larger economic ones.

Members of the Illinois General Assembly, Congressmen Frank Giglio and Morgan F. Murphy, testified in favor of retaining service. Congressman Giglio noted that no mass transit district in the United States can operate on the fare box alone but that its not an easy task putting together something like the Regional Transportation Authority.

Martin A. Russo, United States Representative for the 3rd District of Illinois, considers the service essential. He is concerned about the various environmental considerations including fuel use, air quality, and traffic congestion. To reach the commuter service offered by the Illinois Central Gulf, former South Shore passengers will be using roads in the Third District. Congressman Russo urges continuance of service for another year so that Indiana can raise subsidy funds.

Joseph F. Ligas, chief of Grant Administration for the Division of Public Transportation of the Illinois Department of Transportation, expressed the Department's concern over the proposed discontinuance. He noted that the Department completed in August of 1974 its Preliminary Regional Operations Plan for the Chicago metropolitan area and concluded (1) that while the South Shore's ridership had decreased substantially over the preceding 5 years, the decline had appeared to stabilize, (2) while the South Shore's equipment was old, it was in remarkably good shape for its age and the amount of service it had seen, and (3) some source of continued public funding was necessary to assure the continuance of operations. In fiscal 1972 and 1973, the State of Illinois gave the South Shore a total of almost $500,000 in emergency operating grants. The State of Illinois has a transportation capital improvement financing program which could provide two-thirds of the funds needed to meet the Illinois portion of the non-Federal share of new equipment for the South Shore. If the South Shore is discontinued, commuters would be required to use the world's busiest expressway, the Dan Ryan, aggravating its substantial traffic problems. Mr. Ligas noted that Chicago Transit Authority's Dan Ryan's rapid transit service is already running at peak hour capacity. The only available transit alternative which could be used without adverse effect is the Illinois Central Gulf commuter rail service which is currently running slightly below capacity. He noted that the ICG stations are in many instances far from existing South Shore facilities so that some provisions for feeder bus service would be required. Yet it is common public transit knowledge that to transfer people from bus to trains substantially decreases the attractiveness of public transit. According to the 1970 census, the average Illinois rider on the South Shore has a high school education, earned slightly more than $11,000 anually, and owned a home then worth about $20,000. In summary, the cost to the Chicago metropolitan transit system of the South Shore's discontinuance cannot be measured directly in dollars. Ending this service would require about 6,200 persons to find alternative means of transportation into Chicago. Illinois currently provides approximately $155 million annually to the regional Transportation Authority from which a continuing operating subsidy can be made available to the South Shore. It is hoped that the South Shore will continue to provide its much needed services to the people of Illinois and Indiana.

Cyril C. Wagner appeared for the Northeastern Illinois Planning Commission (NIPC). Its work is coordinated with other planning agencies in Illinois and Indiana, including the Northwestern Indiana Regional Planning Commission, the Illinois-Indiana Bi-State Commission, the Chicago Area Transportation Study, and the city of Chicago. The Commission participated in the preparation of the 1995 Transportation System Plan and incorporated it by reference into its own Comprehensive General Plan which would guide development into a structured pattern. NIPC believes that the South Shore's service is an essential ingredient in its long-range plans and policies for development of the region, that it is needed to meet immediate social and environmental objectives and while it is unreasonable to expect the railroad to absorb losses indefinitely from passenger service, it does not seem an unreasonable burden for it to maintain service until public funds are available. It believes that the discontinuance of a major commuter railroad line, the first in 14 years, would cause businesses in the Chicago central area to wonder which line might be next. Also, older residential communities would become less accessible and, therefore, less desirable, raising the possibility of further blight and neighborhood abandonment. Disproportionately large numbers of people who depend on mass transit are either physically handicapped, elderly, or members of minority groups. NIPC cannot endorse an action which would reduce travel opportunities for these people. Another consideration is the possible increase in air pollution. NIPC notes that the Milwaukee's losses (net of subsidy) in 1969-1973 were $6,947,000 while the South Shore's were only slightly higher at $8,352,000. Though the losses are comparable, the financial condition of the parent companies should be considered.

William Fonvielle appeared on behalf of the Illinois-Indiana Bi-State Commission. He believes that the testimony indicates there is an obvious public need for continued service and requests that the Commission deny the railroad's petition. In turn, the Commission pledges every effort to insure local funds are acquired to match Federal funds to improve and maintain the South Shore. The South Shore discontinuance became a matter of formal action by the Commission at its December 20, 1976 meeting. The Commission cannot take direct action but has been serving as a forum for discussions of the South Shore situation during the past 2 years.

Aristide E. Biciunas, executive director of the Chicago Area Transportation Study (CATS), testified that the existing South Shore service is a vital and integral component of the regional transportation network. CATS formulates plans which are the official guidelines for publicly funded transportation improvements in northeastern Illinois. It coordinates transportation planning with the Northwestern Indiana Regional Planning Commission's planning activities for Lake and Porter Counties, Ind. In mid 1974, CATS, the Northwestern Indiana Regional Planning Commission, the city of Chicago, and the Northwestern Illinois Planning Commission completed a comprehensive 1995 Transportation System Plan which is the official transportation plan for this region. An integral part of the commuter rail component of this 1995 plan is existing South Shore service. The plan recommends continuation and service improvement. CATS believes that long-range transportation planning for northeastern Illinois and northwestern Indiana must be responsive to the effects of reduced energy availability. Using a quadrupled energy price for the year 2000 and taking into account the impending demise of Conrail's Valparaiso to Chicago passenger service, CATS projects that, at current service levels, the South Shore will have an estimated 16,000 boardings daily in the year 2000. This estimates does not consider increased service attractiveness. It believes that the Skokie Swift Service demonstrates how modern equipment, upgraded right-of-way, and an aggressive marketing policy can revitalize a passenger operation. The State of Illinois has indicated that it will participate in the funding of the projects which the South Shore has listed as its needs in the Transportation Improvement Program which CATS has developed. CATS recommends that the Commission deny the South Shore's request for abandoned service and urges that Indiana take immediate steps to insure the provision of the local share of funding.

Thomas F. Harrison, regional counsel of the United States Environmental Protection Agency, Region 5, Chicago (EPA), stated that the EPA opposes the abandonment of service because (1) the Chicago metropolitan region has very severe air pollution problems due to automobile traffic, (2) because Lake and Porter Counties in Indiana and the six counties of northeastern Illinois have been designated as nonattainment areas for photochemical oxidants under the Clean Air Act of 1970 and the six Illinois counties are also designated as nonattainment areas for carbon monoxide, (3) the level of improvement expected by 1980 assumes continued operation of the South Shore, (4) because local, county, and State Governments have participated in regional planning for improved air quality, EPA has assumed that they will act to continue railroad operations, (5) failure of State and local Governments to assure continued operation of the railroad could further interfere with the attainment and maintenance of air quality standards and could jeopardize the certification of transportation planning process by the Federal Highway Administration, and (6) the continued operation of the South Shore is required by Federal transportation policy requiring use of mass transit in urban areas with significant air quality problems and the national policy for the reduction of air pollution in order to protect the public health and welfare.

The National Ambient Air Quality Standards have been established for five air pollutants. Carbon monoxide and photochemical oxidants are the two most affected by railroad abandonments. Over 90 percent of the carbon monoxide emissions in the region originates in the traffic network of the city of Chicago. Because of the current violations of the health standard in the Chicago region, the six northeastern counties of Illinois are designated as an Air Quality Maintenance Area for carbon monoxide under the Clean Air Act. Control of hydrocarbon emissions is the most effective way of making progess toward achievement of the photochemical oxidant health standards. The transportation network of the Chicago metropolitan area generates at least 50 percent of the area's total hydrocarbon emissions. In August of 1976, EPA determined that the State Implementation Plans of Illinois and Indiana are substantially inadequate to provide for the attainment and maintenance of the photochemical oxidant standard. Region 5 of the EPA believes it quite likely that an area from Milwaukee, Wis., to Gary, Ind., will need extensive controls for both stationary and mobile sources of air pollution.

The transportation planning process for major urban areas with air quality problems must be consistent with State Implementation Plans to insure that health related air quality standards are both attained and maintained. In the Chicago metropolitan area, transportation planning is conducted by the Chicago Area Transportation Study (CATS). For Lake and Porter Counties, Ind., the planning agency is the Northwestern Indiana Regional Planning Commission (NIRPC). The Federal Highway Administration periodically reviews the transportation planning process to certify that they are consistent with the applicable State Implementation Plans for air pollution control and certification is required before States may continue to receive Federal aid highway funds. In their planning, both CATS and NIRPC have assumed the continued operation of the South Shore. EPA has concluded that more mass transit, not less, is needed. Discontinuance of South Shore's service would negate some of the benefits to be obtained under the Transportation Control Plan for the city of Chicago which EPA promulgated December 5, 1973, aimed at decreasing carbon monoxide. The city of Chicago has not implemented the mandatory auto emission testing requirement of this plan.

The EPA is critical of the Commission's Draft Environmental Impact Statement because it says nothing about carbon monoxide levels outside of Chicago and does not state what would happen if the overly optimistic assumptions mentioned in the statement do not occur. It also took issue with the Commission's staff statement on the levels of carbon monoxide in downtown Chicago and called unrealistic the Commission's assumption that the current Transportation Control Plan for Chicago would be fully implemented. EPA believes that the Commission's Impact Statement gives the current carbon monoxide readings levels which are actually predictions based on modeling that made unrealistic and, in its judgment, unachievable assumptions about controls on carbon monoxide emissions from automobiles by 1980.

In EPA's view any plan to limit ozone and carbon monoxide concentrations will need to stress less polluting, more efficient modes of transportation. Private automobiles do not meet this criterion, mass transit does. The ozone problem is hard to control and so serious for public health and welfare that great care must be exercised to maintain regional planning and implementation of reasonable measures to minimize hydrocarbon emissions. Carbon monoxide violations of health standards must be controlled as well and the effects of current programs to cut levels in downtown Chicago must be preserved. The abandonment of the South Shore Railroad runs counter to both these goals and throws into question the viability of the planning process. In order to ensure that progress continues to be made towards the national environmental policy objectives of the Clean Air Act and the Urban Mass Transit Act, the EPA strongly recommends against approval of the proposed abandonment of the Chicago, South Shore and South Bend Railroad.

Attorney Daniel Swartzman spoke on behalf of the Chicago Lung Association. Because air pollution is a major aggravant and irritant of lung disease, one of the Association's objectives is the establishment and maintenance of an air pollution control system which insures that the public will have a healthy environment in which to live. It is also concerned that existing air pollution problems are not aggravated further. The Association believes that the proposed action could have an adverse effect on public health. It notes that the Commission's Draft Environmental Impact Statement said that eliminating passenger service would not result in any significant lessening in sulphur dioxide or particulate emissions from either Indiana or Illinois power generating plants but would increase automobile use which would aggravate the area's already dangerous carbon monoxide and photochemical oxidant pollution problems. He noted that the Federal primary health standard for carbon monoxide is violated frequently in downtown Chicago and that the State of Illinois lacks a plan to deal effectively with the problem. Mr. Swartzman commented that the Commission's Draft Environmental Impact Statement omits the significant details of how far we are from full implementation on a Federal Transportation Control Plan. He believes the 1980 goal is practically impossible because auto makers cannot or will not comply to their 1978 model cars. He is critical of the Commission's treatment in its Draft Environmental Statement of hydrocarbon emissions because it does not explain that they are one cause of the consistently high levels of photochemical oxidants measured in Chicago and throughout the Midwest. Also the statement does not mention emissions of oxides of nitrogen. He asks several questions about table 4.3 entitled Air Emission Factors of Alternative Modes of Transport in the Commission's draft statement. He points out that many times during the summer months, the level of ozone in Chicago and the Midwest exceeds the Federal primary health standard which is 0.08 parts per million on a 1 hour average. In his opinion, any increase in vehicle miles traveled anywhere within the region will greatly hamper attempts to combat the ozone problem in a wide territory, yet this important ramification of the Commission's decision is not mentioned in the Draft Environmental Impact Statement. The Association hopes that the Commission will explore more deeply the environmental ramifications of its decision, especially the impact on air quality.

Nelson Forrest spoke for the Greater North Michigan Avenue Association which encompasses those businesses located in an area bounded by the Chicago River, Lake Michigan, the North Branch Canal of the Chicago River, and North Avenue or Lincoln Park. The Association considers that the South Shore commuter service is an essential service that needs public financial support and all possible assistance for service improvements. It urges the Commission to promote discussion and agreements among Government agencies, civic leaders, and the railroad in order that essential subsidy funding may be forthcoming within 80 days.

Ann Lutterbeck, assistant vice president of Personnel of CNA Insurance Company in Chicago, stated that the company employs 5,310 people at its office in the Loop. The company's record indicates that 7.7 percent or 382 employees live in the area served by the South Shore which includes the southeast section of Chicago and East Chicago, Hammond, Gary, Hobart, and Whiting, Ind. Many employees have told the company that discontinuance of the service might endanger their future employment. Most of these people are clerical and secretarial personnel whose monthly salary is in the $700 range and it is doubtful that they could secure comparable local employment.

Frederick Ford of Gary, Ind., has ridden the South Shore for 23 years. He considers its continuation a necessity. He suggests that the Commission look into whether the South Shore was making money at the time control was acquired by the Chessie. If not, he wonders whether the Chessie acquired control to use it for what they thought was a better purpose. He also wonders what happened to the money that the South Shore received from the sale of the right-of-way to the Indiana Toll Road. He notes that no business can continue to operate year after year without spending money for new equipment. Yet, no money has been spent on passenger cars to his knowledge. He suggests that in spite of the warnings in the South Shore's presentation, service is safer than travel on Interstate Route 94, the Indiana Toll Road, or the Dan Ryan Expressway. He also questions the railroad's calculation of its capital cost for $39 million, noting that 15 years is an awfully short period of time to borrow money. He also questions whether with new equipment maintenance cost would stay at the same level. In his opinion, it is improper to use allocated costs for determining savings to the railroad if passenger service would end. He takes issue with the railroad's conclusion that declining use of the train demonstrates that it is not needed. He suggests that the declining use represents declining schedules, equipment which cannot operate on time and no effort on the part of management to make timely connections with other public transit. As to the question of alternative common carrier service, he is unaware of any existing service that stops at Miller and Tremont and is able to pick up commuters and deliver them to the central city.

Charlotte Strowhorn has commuted on the South Shore from Gary for 21 years. She has three children and works at CNA Insurance and characterizes herself as "one of those commuters, and there are many of them, just ordinary people coming to work to make livelihood and not for fun and not for anything else and this is the only way we have to get to Chicago to the Loop area." She cannot drive and she understands Greyhound would offer service at almost 50 to 100 percent markup which is too high for her.

George Cook of Griffith was the only commuter member on the Indiana Study Commission of 1974. He noted that this is a budget year for the State of Indiana so that if nothing comes out of this legislative session which runs for 45 days beginning in early January, nothing can be presented again for a period of 2 years. He requests that the Commission deny the railroad the ability to discontinue service for a minimum period of 6 to 8 years.

The League of Women Voters of Illinois was represented by Betty Cameron. The League's position is that public transportation is a public service which provides benefits to more than riders alone and whose costs should be publicly subsidized. In 1972, the League actively supported the establishment of a Regional Transportation Authority in Illinois. It notes that transportation is not simply moving people, it is related to the development of cities and to many of our urban problems. In 1974, 94.6 percent of the population and 96.9 percent of the jobs in the Chicago-Northwestern Indiana area were located in 3-mile bands on each side of the 12 commuter rail lines running throughout the region. At a time when Chicago must develop a traffic control plan, enforce auto emission standards, and reduce automobile use in the central areas, there can be no rationale for discontinuing service on an electric line, potentially one of the least polluting forms of transportation known. Additionally, the overcrowding of the Dan Ryan Expressway provides a greater stimulus for the use of alternatives such as the South Shore. In making its decision, the League requests that the Commission consider the potential beneficial impact of a strong public transportation system, the additional costs related to discontinuance, the potential funding from a realignment of transportation priorities at all levels, the long-range potential for increased ridership, the efforts of local, State, and regional agencies to organize local responsibility and funding, and the need for a reasonable period of time to accomplish this, the increased Federal involvement in funding public transportation and the importance of an equitable allocation of costs and revenues between the passenger and freight services of a private carrier.

Patricia J. Cushing of Griffith spoke for about 20 students attending the American Academy of Art and who live in northwest Indiana. These people commute to Chicago every day to attend classes and it would be impossible for most of them to continue their education without service.

Mike Kramer of Chicago spoke in favor of continued service on behalf of the National Federation of the Blind of Illinois. The Federation passed a resolution on January 8, 1977, urging the Commission to continue service. Mr. Kramer noted that many people, not only blind people, need the South Shore to get to their jobs, that existing highway facilities are overcrowded, and that communities such as Aurora and

Elgin which lost service by an electrical railway are now trying to get the Chicago Transportation Authority to run additional trains into those areas.

Melvin Tracht of Odgen Dunes is vice president of the Illinois Institute of Technology in Chicago. Mr. Tracht thinks that the service somehow must be considered. He sees the key to the solution as money and not simply a power play of trying to force the railroad to continue operations. In a recent letter to the Chicago Tribune, he took issue with the reported testimony by some elected officials at the Michigan City hearings. He believes that the railroad has acted in a far more responsible way than other commuter railroads and that it is true that freight service has been subsidizing passenger service to the extent of millions of dollars over the past decade. If it were not for the freight service, the South Shore would have gone the way of the defunct North Shore and Aurora and Elgin Lines many years ago. In view of the availability of Federal funds of up to 80 percent to replace the antiquated passenger cars and 50 percent of operating deficits, he thinks that the matching money is a very modest amount. Since Illinois is already doing its share, it is really up to Indiana and/or local Governments. He thinks that the outlook is bleak, however, if the newspaper reports of the hearings are correct some of the Indiana leaders do not even recognize the problem.

Phillip A. Bauer, general chairman of Great Lakes System Board of Adjustment of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC), submitted a roster with 60 names of employees holding seniority with the South Shore Railroad under existing agreements. There are 42 full-time employees represented by BRAC in the service of the South Shore. It is the union's position that a number of jobs or those of almost 50 percent of the carrier's clerical force would be abolished. They are: secretary, vice-president, and controller at Michigan City, director of purchase and stores at Michigan City, payroll clerk at Michigan City, ticket agent at Hegewisch, clerk-passenger at Michigan City, manager passenger transfer service at Michigan City, ticket agent at Hammond, ticket agent at East Chicago, porter at various locations, mail and station clerk at Michigan City, treasurer and clerk-typist at Michigan City, ticket agent at Gary, traveling auditor at Michigan City, ticket agent at various locations, station accountant at Michigan City, steno-clerk at Michigan City, and ticket agent at South Bend. Numerous employees who would be furloughed have over 20 years with the carrier and many would not be able to obtain jobs because of their age.

If the discontinuance is granted, BRAC understands that the operation of the carrier would be reduced to nothing more than an agency office of the C&O Railroad and it believes this imposes another burden upon the remaining employees. It requests that the Commission take into consideration the welfare of the employees who would be drastically affected by the carrier's proposed discontinuance.

Bonnie Louise Timm is local chairman of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees South Shore Lodge Number 345 (BRAC). She spoke for the Lodge's 51 members in supporting the testimony of Mr. Bauer. She has worked for the South Shore for 19 1/2 years and has never observed any positive action by the Chessie to save passenger service. She takes issue with the railroad's cost witness as to the proposed elimination of the position of comptometer operator if passenger service is discontinued. Other than balancing a report three or four times a year, that person's responsibilities only concern freight train operations.

Robert D. Hopper is a conductor with the South Shore and is legislative representative and general chairman for U.T.U. members employed by the railroad.

The U.T.U. is the collective bargaining representative for conductors, enginemen, collectors, and brakemen in passenger and freight service. He expects that 60 U.T.U. members would lose their jobs if service is discontinued and other employees would be adversely affected by the bumping process. The U.T.U. members do not hold rights on the Chessie system and it would be difficult for them to find new jobs. He pointed out that the number of South Shore employees has gone from 480 in 1971 to 306 in 1977. Also that the railroad's passenger counts do not show people moving eastbound although there is a considerable number of commuters who travel in that direction. In his opinion, the South Shore sacrificed revenue when it eliminated parcel service on December 31, 1975. In both 1970 and 1971, this service had revenues of $160,000 to $170,000. He disagrees with the railroad's position that freight crews are paid overtime because of delays caused by passenger trains. Since the Chessie took control, the policy has been to give preference to freight trains. Overtime payments to freight train crews is largely the result of longer and heavier trains, not because of interference from passenger trains. He considers that an unusual amount of maintenance-of-way work was done in 1975-76 and much of this has been to upgrade the track to carry heavier freight trains. He detailed why he foresees serious operating problems if the proposed single tracking of line between Kensington and Gary and the removal of signals and communications, except radio, takes place. He does not agree with the railroad's cost witness that the freight operation could be handled by one dispatcher. The agents at Hegewisch, Gary, Michigan City, and South Bend handle freight and passenger service. Gary has two different people. The only all-passenger stations are Hammond, East Chicago, and Randolph Street. The U.T.U. is concerned with the drop in bridge traffic which was mostly lumber and moved from Burnham Yard to Conrail at Gary, the Norfolk and Western at Michigan City, and Conrail at Olive. The U.T.U. opposes the discontinuance of passenger service and abandonment of operations over the Illinois Central Gulf. If the railroad's requests are granted, it seeks appropriate employee protective conditions.

George J. Nixon, Jr., is director of Research for the American Train Dispatchers Association. In his opinion, even without 39 passenger trains, the South Shore's freight operations would require train dispatchers around the clock, three shifts, thus no cost for train dispatching could be avoided by the discontinuance of passenger service.

Arnez Miller of Wilmette, Ill., recalls the demise of the North Shore and Skokie Valley Line and how today officials say it would cost $20 million per mile to reopen a rapid transit line on the route of the old Skokie transit line.

Paul Oppenheimer spoke for the citizens of Hyde Park who are concerned that, if service is discontinued, most of the 2,000 people who are expected to drive into Chicago will travel through the neighborhoods of Hyde Park and Jackson Park substantially increasing air pollution.

Alice M. Bush of East Gary commutes during the week to Chicago taking the 6:42 a.m. from Miller and returning on the 5:04 p.m. from Randolph Street. She is a widow and does not own a car. The South Shore is her only way to get to work. Without it she might have to sell her home which is almost paid for. She has checked on jobs in the area and if she found one it would pay 40 percent less than she makes now.

Dennis Zamirowski of Chicago takes the train regularly from Chicago to his job at U.S. Steel in Gary at 6 a.m. returning to Chicago on the 4:25 p.m. He thinks the South Shore discourages passengers by giving priority to freight trains, by failing to tell people about delays, and not posting schedules. He wonders whether the Chessie acquired control to obtain tax write-offs and what happened to the money that was supposedly in escrow in 1971 for new equipment. Mr. Zamirowski has been riding the train for 9 years and discontinuance would cause him great inconvenience.

Patrick Cane is also a reverse commuter. He takes the 7:14 a.m. train from Chicago and returns from Gary on the 4:25 p.m. He thinks the service is good. Maybe 1 time out of 50 a train will be very late, but usually he can set his watch by it and it goes in all kinds of weather. He can drive his car but it would not make any sense.

Annie Bell of Michigan City has worked as a custodian in the Everett McKinley Dirksen Federal Building in Chicago for 21 years. She has been riding the South Shore for 14 years. She gets off work at 12 midnight and it is too late for her to be driving on the highway.

M. P. Venema is chairman of the Public Transportation Committee of the Chicago Association of Commerce and Industry, a voluntary organization of individuals, firms, and corporations which function as the chamber of commerce for the Chicago metropolitan area. The Association has a vital interest in the continued viability of Chicago's central business district and sees the South Shore as the only public transportation link between the many growing communities it serves and downtown Chicago. The Association supported creation of the Illinois Regional Transportation Authority and requests that the South Shore be required to continue service so that current efforts by various organizations to obtain adequate funds to continue the service can be obtained. As a business organization, the Association realizes that the Chessie system cannot be expected to subsidize passenger service and it believes it is unfair to burden freight shippers whose interest in passenger service is minimal or nonexistent. It notes that the entire community realizes the benefits of public transportation, including nonriders who enjoy less congested highways.

James Schwinkendorf of Griffith commutes in from East Chicago to Chicago. He does not think the South Shore is a poor railroad and has done some calculations of its profitiability. In 1975, which was reportedly a bad year for the railroad industry, the South Shore had a 20 percent before taxes profit on earnings. Using only the earnings from freight and other income, the railroad had 38.1 percent profit before taxes. He finds this inconsistent with the railroad's position that it is a poor railroad. He also notes that it was able to support a capital program of $561,000 in 1975 which was up from $151,219 in 1974 and that it was able to increase its working capital by $1.2 million. Mr. Schwinkendorf is a railroad employee and has noted that the South Shore's own right-of-way appears to be in a very good state of repair, generally with continuous welded rail, and what appears to be good ties and ballast. It seems to him that the only capital expenditures omitted in recent years have been on passenger equipment. He is not aware of any attempts by the railroad to secure funds under the terms of the Railroad Revitalization and Regulatory Reform Act. In his opinion, passenger service is not that much of a drain on the South Shore's profitability. He has tried driving to work and using the Conrail service and both of them were unsatisfactory. If the service is discontinued, there is a strong possibility that he will move out of the Calumet region to a location where he could commute with less difficulty. He favors denying the request until a subsidy can be arranged.

At a time when more and more communities are trying to institute mass transportation systems and reduce fuel consumption, Citizens for a Better Environment believe it would be bad policy to discontinue South Shore's passenger service and urge that the Commission weigh the cost of discontinuance on recreation, the environment, and the riders as opposed to the benefits to the South Shore.

Jack Cornelius spoke on behalf of the Chicago Central Area Committee, the Building Managers Association of Chicago, the Chicago Convention and Tourism

Bureau, the Greater North Michigan Avenue Association, Southside Planning Board, State Street Council, and Washington Avenue Organization. All these organizations are involved in the continued viability of downtown Chicago. They do not believe that any passenger service in the country is operating without some form of subsidy. Furthermore, they realize it is the very foundation of private business that you get rid of a losing operation. In this particular situation, however, they request that the Commission grant a period of time so that parties that have begun to act can work with Indiana and the South Shore to find a way to rescue the operation. They believe that retention of mass transportation corridors is essential for the success of the center city and they note that the South Shore and Conrail are the only carriers serving a major corridor to the southeast. They have been active with the city of Chicago in producing a plan called Chicago 21 which states that means have to be found to decrease the volume of vehicles in the downtown area by 20 percent in the next few years. The only way to do this is to institute more efficient mass transportation.

Helen M. Salitros of Chicago is 72 years of age and is moved by the beauty of the Indiana Dunes which she visits using the train one to three times a week during the spring and summer season. She thinks this country needs to continue service to remain viable as a people.

James R. Whitehouse, superintendent of Indiana Dunes National Lakeshore since 1970, explained that Indiana Dunes is a unit of the National Park Service, a federally managed area under the United States Department of the Interior. The park consists of an area of beaches, dunes, bogs, marshes, and woodlands located along the South Shore of Lake Michigan between Gary and Michigan City, Ind. The park was created in 1966 as one of the first urban national parks and enlarged to a total of 11,900 acres by legislation in 1976. That legislation authorized $60.8 million for land acquisition and $8.5 million for development. Until now Indiana Dunes has been largely in the planning, land acquisiton, and early development stages. It is expected that beginning in 1980 the park will have more than 1 million annual visitors. The National Park Service adopted mangement policies in 1975 favoring mass transit wherever feasible. The Indiana Dunes National Lakeshore master plan developed in 1969 recommends internal minitrain and shuttle bus systems to conserve limited space and reduce vehicle congestion on park roads. The plan also notes that the South Shore had expressed an interest in providing service to park visitors and in 1967 had developed plans with a consultant for the National Park Service showing how public transportation could be utilized using the South Shore facilities. The park had 153,854 visitors in 1976 but expects many more with the opening of the West Beach area in May 1977. With the expansion of the park in October 1976, 11 miles of the South Shore's line are within the park's boundaries.

Harold Bradley of Hammond presented a resolution passed by the National Federation of the Blind of Northwest Indiana on January 13, 1977, deploring the South Shore's plan to terminate passenger service and requesting that, if it happens, the Indiana Transportation Department provide alternative public transportation.

Kathy Shook read the statement of Helen Bieker, secretary of the Lake Michigan Federation, a four-State coalition of citizens and citizen groups concerned with the wise use and preservation of Lake Michigan. The group is concerned with the impact of discontinuance on the Indiana Dunes National Lakeshore, the Indiana Dunes State Park, and the various private users of recreational facilities on Lake Michigan. It believes that discontinuance is inimicable as expressed in the legislation authorizing the Indiana Dunes Lakeshore expansion, energy conservation under the Energy Policy and Conservation Act of 1975 and increased use of formerly polluted water and adjoining lands under Public Law 92-500, The Water Quality Amendments of 1972. The Federation notes that the Indiana Dunes National Lakeshore is the only major national park fully accessible from an urban area via public transit on a daily basis.

Carter H. Manny, of Michigan City, Ind., noted that for half a century the South Shore has made a direct contribution to his family's welfare. His family has had at least one kind of South Shore commutation ticket since 1926. The train has been used by his grandmother, his father, his mother, his wife, and his two children. He began commuting daily between Michigan City and the Chicago Loop at the end of 1948. He no longer commutes daily during the winter months but he does use the train on weekends and for regular mid-day monthly meetings. Because of family illness, he has been forced to drive between Michigan City and Chicago more frequently than he would like and he has come to hate it. Driving costs a minimum of $10 as opposed to $4.32 for the train but, more importantly, he misses the 2 1/2 hours a day which he used to enjoy for concentrated mental effort. His firm did the architectural drawings for the 87th Street parking facility and he believes that Mr. Pikarsky was incorrect when he quoted from memory that the planned parking would accommodate 10,000 cars. The drawings by his firm are for approximately 1,500 cars with expansion later to a total of some 3,000. In any event, the concept of the 87th Street facility and the one at Jefferson Park on the Kennedy Expressway was to reduce traffic congestion and not to take over rail traffic from commuter lines like South Shore. Mr. Manny does not know who the adversary is in this particular hearing. He has known the operating heads of the South Shore and believes they have done an excellent job so that by and large service is quite good. He can understand the withdrawal of the equipment funding offer when it took years to gain the necessary State legislation and additional time to create the first two-county transit authority which could use it. He does not see the unions as the culprit. He has known many of the men by their first names and all have been dedicated to the railroad and its passengers. He thinks that perhaps the Indiana legislature, city, and county officials have done very little until recently but he understands that they have a larger constituency than just South Shore riders. As for the Interstate Commerce Commission, he thinks perhaps this is a futile hearing in that the agency was created three generations ago to deal with problems of another time. He believes the real culprit is the Mass Transportation Act that asserted the requirement for local funds. He expects this requirement was thought to be the best way to insure accountability but it has also been a great stumbling block and he notes that it would have been impossible to create a highway network if we had to start from scratch to create new local tax units.

He notes that this country has created a fantastic personal transportation system using the automobile and the highway but he believes we do not have the practical capability to carry it on and automate it as we once hoped. Nor do we have the fuel to sustain it. He thinks it is time that we got on with the task of developing a balanced transportation system that we can afford. He thinks there is a real possibility that gasoline prices will double and triple from the present 63 cents a gallon and ridership on the South Shore will increase. He is hopeful that our country will have a transportation policy which recognizes the merits of rail transit and that an effective means will be found to bring about regional authorities which can achieve an optimum balance of transportation modes within each natural economic region without being hamstrung by jurisdictional boundaries of present units of Government.

April Young spoke for the Open Lands Project, a Chicago area conservation organization devoted to the preservation of the region's land for public recreational use. She believes it is ironic that the proposed discontinuance comes at the precise moment when efforts to preserve the Dunes are finally coming to fruition. She notes that the South Shore provides an important transportation alternative to people who by reason of age, income, or personal preference are unable or unwilling to drive. She urges the Chessie system, the South Shore, and the National Park Service and others cooperate to expand passenger service to the Lakeshore and find ways to meet both the economic needs of the railroad and the social needs of the larger community.

Marshall Patner appeared in opposition on behalf of an ad hoc committee of 24 users of the South Shore's service and the Business and Professional People for the Public Interest (BPI). BPI is a Chicago based public interest organization representing citizens on issues that directly affect the quality of life in Chicago and its surrounding areas, including northern Indiana. Mr. Patner is deeply concerned about the adverse effects discontinuance would have on environment, planning and traffic, and access to the National Lakeshore. He believes that if the discontinuance is decided on these issues alone it would have to be denied. He questions whether the South Shore is obliged under its charter, any enabling legislation or otherwise, to provide passenger service and whether any terms of the acquisition of control by the Chesapeake and Ohio Railroad contained such an obligation. He is critical of the way the South Shore has been permitted to separate its passenger and freight services so that it is making a profit on one while ignoring the other. He believes that the railroad has upgraded its freight service and regularly sought competitive freight rates while letting its passenger service deteriorate and has discouraged passenger service in order to build the appearance of an increasing deficit.

Doris Shellberg of Chicago disagrees with the South Shore's statement that reasonable alternative common carrier service exists between Hegewisch and the Loop. She commutes daily to Randolph Street from Hegewisch on the 7:06 a.m. and returns on the 4:28 p.m. The distance is 19 miles, the trip takes 31-36 minutes, and the fare is $1.12 per ride on a 25-ride commuter ticket. About 500 commuters board the South Shore at Hegewisch daily. Another 600 commuters ride 12 buses operated by the South Suburban between Hegewisch and the Loop between 5:55 a.m. and 9:05 a.m. Each bus can handle 50 passengers so they are already filled. The fare is $1 per ride and it can take as long as 1 1/2 hours depending on traffic delays. Ms. Shellberg would have to catch a bus at 6:15 to get to work by 8 a.m.

If the South Shore service ends, she expects that a total of 2,450 commuters would be using South Suburban's service out of Hegewisch. This includes the 600 using it now, the 500 people boarding the South Shore at Hegewisch, 1,000 more who would drive in from Hammond and East Chicago, and 350 more who would drive in from more distant points. Her estimates are based on the number of people riding the train now and her visual inspection of some of the cars parked at Hegewisch at 8:45 a.m. on November 22, 1976, when almost one quarter of the cars had Indiana license plates and one was from Ogden Dunes. At 50 people a bus, it would take 49 buses, or one every 3 minutes, between 5:55 a.m. and 9:05 a.m. to handle this number of people. Hegewisch has no alternative rail or air commuter carrier service.

Marcella Gewirth presented the position of the board of directors of the Hyde Park-Kenwood Community Conference. The Conference represents approximately 1,200 families in the southeast section of Chicago immediately adjacent to Jackson Park and Burnham Park. The Conference believes that if the railroad ceases passenger service more than 2,000 cars will travel into Chicago via U.S. Highway 41, South Stoney Island Avenue, and South Lakeshore Drive or via the Dan Ryan Expressway. The first three roads join immediately east of Jackson Park and the Dan Ryan Expressway is one-half mile to the west of Hyde Park. The result would mean hundreds of tons of hydrocarbons and nitrogen oxides would be added to the air space and during the ozone season, between April and October, a substantial amount of these auto exhaust pollutants would be converted to ozone after they have blown out over Lake Michigan on prevailing southwesterly winds. Ms. Gewirth noted that the official records shows that Chicago had an ozone yellow alert for 29 days last year. When this occurs 15 to 20 percent of the community's residents, 7,000 to 9,500 people, must restrict their activity. These people are senior citizens, people with heart or lung disease, children under 1 year of age, and black males with the genetic red blood cell dysfunction called GP-6-D syndrome. She urges that every possible measure be taken to protect citizens from this ozone health threat. She also asks that the Commission consider that increased traffic would contribute to changing Jackson Park from an urban refuge to an extension of the city. Jackson Park is a National Historic Landmark District and the Chicago Park District is charged with preserving the great American landscaper Frederick Law Olmstead's creation there. She noted that area roads already average three to six accidents a day which can only increase with more traffic. Finally, she notes that the United States Department of Transportation does not advocate increased amounts of traffic through Historic Districts.

Rhiman A. Rotz, associate professor at Indiana University Northwest (Gary), believes discontinuance would have a considerable negative impact on people at that institution and the institution itself. South Shore service is used by faculty and students both to attend classes and to take advantage of the resources available in Chicago. Professor Rotz points out that Indiana University Northwest has been able to supplement faculty by hiring people associated with Chicago institutions thus expanding its course offerings and the quality of its instructions.

EASTBOUND monday through friday

Miles		EASTBOUND Time shown is that in effect in Chicago		251	5	153	157	259	261	161	26[illegible]	265	165	267	269	271	171	273	77	177	279	81	285
		CHICAGO	Ill.	AM	AM	AM	AM	AM	AM	AM	PM	PM	PM	PM	PM	PM	PM	PM	PM	PM	PM	PM	PM
0	Lv	Randolph St.	"	12.45		6.00	7.14	[illegible]	9.20	11.28	12.28	2.02	2.58	3.28	4.05	4.28	4.53	5.04	5.18	5.28	5.58	7.00	9.15
0	Lv	Van Buren St.	"	12.47		6.02	7.16	[illegible]	9.22	11.30	12.30	2.04	3.00	3.30	4.07	4.30	4.55	5.06	5.20	5.30	6.00	7.02	9.17
0	Lv	Roosevelt Rd. (Cen. Sta.)	"	12.49		6.04	7.18	[illegible]	9.24	11.32	12.32	2.06	3.02	3.32	4.09	4.32	4.57	5.08	5.22	5.32	6.02	7.04	9.19
7	Lv	57th St. (Univ. of Chgo.)	"	12.55		6.11	7.25	8.5[illegible]	9.30	11.39	12.39	2.13	3.09	3.39	4.15	4.39	5.04	5.15		5.39	6.09	7.11	9.25
8	Lv	Woodlawn (63rd St.)	"	12.58		6.13	7.27	8.53	9.32	11.41	12.41	2.15	3.11	3.41	4.17	4.41	5.06	5.17	5.31	5.41	6.11	7.13	9.27
14	Lv	KENSINGTON	"	1.06		6.21	7.35	9.01	9.41	11.52	12.52	2.26	3.22	3.52	4.26	4.52	5.17		5.40	5.52	6.21	7.24	9.36
17	Lv	Calumet Harbor	"	f 1.09		f	f 7.39	f 9.04	9.45		f 12.55		f 3.25							f 5.56			f
19	Lv	HEGEWISCH	"	1.13		6.29	7.42	9.07	9.48	11.58	12.59	2.35	3.28	3.58		4.59	5.25	5.35	5.45	6.00	6.28	7.29	9.43
21	Lv	HAMMOND	IND.	1.17		6.33	7.46	9.11	9.52	12.02	1.02	2.40	3.32	4.03	4.36	5.04	5.30	5.40		6.05	6.33	7.33	9.47
23	Lv	EAST CHICAGO	"	1.22		6.37	7.50	9.16	9.57	12.07	1.07	2.45	3.37	4.08	4.41	5.09	5.35	5.45		6.10	6.38	7.38	9.52
28	Lv	Clark Road	"	B 1.26		■ 6.42	■ 7.54	B 9.20			B 1.11		B 3.41	B 4.12		B 5.13	B 5.39			B			
29	Lv	Ambridge Ave. (Gary)	"	f 1.29		■ 6.45	■ 7.56	f 9.22	f 10.03	f 12.13	f 1.13	f 2.51	B	f 4.14		f 5.15	B 5.41			B		f 7.44	f 9.57
30	Lv	Buchanan St. (Gary)	"	f		B	B	f	f	f	f	f	B	f		f	B			B		f	f
31	Ar	GARY	"	1.35		6.50	8.00	9.25	10.10	12.20	1.20	2.54	3.50	4.20	4.50	5.20	5.45	5.55	6.01	6.25	6.50	7.50	10.05
31	Lv	GARY	"	1.35				9.25	10.10		1.20	2.54		4.20	4.50	5.20		6.03	6.01		6.50	7.50	10.05
35	Lv	Miller	"	f 1.41				f 9.30	f 10.15		f 1.25	f 2.59		f 4.25	f 4.56	f 5.25		f 6.08			f 6.56	f 7.55	f 10.10
39	Lv	Ogden Dunes	"	B 1.44				f 9.35	B 10.20		f 1.30	f 3.04		f 4.30	f 5.01	f 5.30		f 6.14			f 7.00	f 8.00	f 10.15
40	Lv	Midwest (Wilson)	"					f 9.37	f 10.25		f 1.32	f 3.06		4.32		f 5.32		f 6.16			f 7.02		f 10.20
43	Lv	Bailly	"	B 1.51				f 9.42			f 1.36	f 3.11		f 4.36	f 5.08	f 5.37		f 6.21			f 7.07	f 8.06	f 10.21
45	Lv	Dune Acres (Mineral Spgs.)	"	B				f 9.44	B 10.29		B 1.37	B 3.12		B 4.37		f 5.38		f 6.23			f 7.08	f 8.08	f
46	Lv	Port Chester	"								f			f	f 5.11	f 5.39		f 6.24			f 7.09		
47	Lv	TREMONT (The Dunes)	"	f 1.55				f 9.46	f 10.33		f 1.40	f 3.15		f 4.40	f 5.13	f 5.41		f 6.26			f 7.11	f 8.11	f 10.26
51	Lv	Beverly Shores	"	f 1.59				f 9.50	f 10.37		f 1.45	f 3.19		f 4.45	f 5.18	f 5.45		f 6.31			f 7.15	f 8.15	f 10.30
52	Lv	Pines (Tamarack)	"																				
56	Lv	MICHIGAN CITY	"	2.10	5.05			10.00	10.45		1.55	3.30		4.55	5.30	5.55		6.40	6.30		7.25	8.25	10.40
57	Lv	Shops	"	2.15	f 5.10			10.05	10.50		2.00	3.35		5.00	5.35	6.00		6.45	6.35		7.30	8.30	10.45
62	Lv	Springville	"		f 5.15																		
65	Lv	LaLumiere	"		f 5.18																		
67	Lv	Tee Lake	"		f 5.20																		
68	Lv	Smith	"		f 5.22																		
71	Lv	Rolling Prairie (Birchim)	"		f 5.26																		
74	Lv	Lake Park	"		f 5.29																		
75	Lv	Hudson Lake	"		f 5.30															B				f 8.49	
76	Lv	NEW CARLISLE	"		f 5.32																	f 8.51	
83	Lv	Lydick	"		f 5.40																		
84	Lv	Chain O'Lakes	"		f																		
88	Ar	SOUTH BEND	"		5.46														7.10	•		9.05	
				AM	AM	AM	AM	AM	AM	PM	PM	PM	PM	PM	PM	PM	PM	PM	PM	PM	PM	PM	PM

subject to change without notice

weekends & holidays

Miles	EASTBOUND Time shown is that in effect in Chicago		351	459	361	463	365	469	373	479	383
	CHICAGO	Ill.	AM	AM	AM	AM	PM	PM	PM	PM	PM
0	Lv Randolph St.	"	12 45	7 58	9.58	11.59	2.28	4.05	4.58	5.58	9.15
0	Lv Van Buren St	"	12 47	8 00	10 00	12.01	2.30	4.07	5.00	6.00	9.17
0	Lv Roosevelt Rd (Cen. Sta.)	"	12 49	8 02	10 02	12.03	2.32	4.09	5.02	6.02	9.19
7	Lv 57th St. (Univ. of Chgo.)	"	12 55	8.09	10 09	12.10	2.39	4.16	5.10	6.09	9.26
8	Lv Woodlawn (63rd St.)	"	12 58	8 11	10.11	12.12	2.41	4.18	5.11	6.11	9.28
14	Lv KENSINGTON	"	1 06	8.21	10 21	12.21	2.52	4 27	5.22	6.21	9.36
17	Lv Calumet Harbor	"	f 1 09	f 8 25		B	f 2.55			B	B 9 40
19	Lv HEGEWISCH	"	1 13	8 28	10 28	12.28	2.58	4 33	5.28	6 28	9 43
21	Lv HAMMOND	IND.	1 17	8 33	10.33	12 33	3 03	4.38	5.33	6 33	9 47
23	Lv EAST CHICAGO	"	1 22	8 38	10.38	12.38	3.08	4.43	5.38	6.38	9 52
28	Lv Clark Road	"	B 1 26	B 8 42		B 12.42	B 3.12	B 4.47	B 5.42		B 9 55
29	Lv Ambridge Ave. (Gary)	"	f 1 29	f 8 44	f 10.44	f 12.44	f 3.14	f 4.49	f 5.44	f 6.44	f 9.57
30	Lv Buchanan St. (Gary)	"	f	f	f	f	f	f	f	f	f
31	Ar GARY	"	1 35	8 50	10 50	12.50	3.20	4.55	5.50	6 50	10.05
31	Lv GARY	"	1.35	8.50	10 50	12.50	3.20	4.55	5 50	6 50	10.05
35	Lv Miller	"	f 1 41	f 8 55	f 10 55	f 12 55	f 3.25	f 5.00	f 5.55	f 6.55	f 10.10
39	Lv Ogden Dunes	"	B 1 44	f 9 00	f 11 00	f 1.00	f 3.30	f 5.05	f 6.00	f 7.00	f 10.15
40	Lv Midwest (Wilson)	"		f 9.01	f 11 01		f 3.31			f 7.01	
43	Lv Bailly	"	B 1.51	f 9 06	f 11 06	f 1.06			f 6.06	f 7 06	f 10.21
45	Lv Dune Acres (Mineral Spgs.)	"	B	B 9 07	f 11 07	f 1.07	f 3.37	f 5.12	f 6.07	f 7.07	B 10.22
46	Lv Port Chester	"		B	f 11 09			f 5.13		f 7.08	
47	Lv TREMONT (The Dunes)	"	f 1.55	f 9.11	f 11 11	f 1.11	f 3.41	f 5.15	f 6.11	f 7.11	f 10.26
51	Lv Beverly Shores	"	f 1.59	f 9.16	f 11 16	f 1.16	f 3.46	f 5.20	f 6.16	f 7.16	f 10.30
52	Lv Pines (Tamarack)	"									
56	Lv MICHIGAN CITY	"	2.10	9 25	11 25	1.25	3.55	5.30	6.25	7.25	10.40
57	Lv Shops	"	2.15	9.30	11 30	1.30	4.00	5.35	6.30	7.30	10.45
62	Lv Springville	"									
65	Lv LaLumiere	"								f	
67	Lv Tee Lake	"								f	
68	Lv Smith	"					Runs Saturdays Only	f 5.46	Runs Saturdays Only	f 7.41	
71	Lv Rolling Prairie (Birchim)	"		f 9 44		f 1.44		f 5.49		f 7.44	
74	Lv Lake Park	"		f 9.47		f 1.47				f 7.47	
75	Lv Hudson Lake	"		B 9 48		f 1.48		f 5.53		f 7.48	
76	Lv NEW CARLISLE	"		f 9.50		f 1.50		f 5.55		f 7.50	
83	Lv Lydick	"		f 9.58		f 1.58				f 7.58	
84	Lv Chain O'Lakes	"									
88	Ar SOUTH BEND	"		10.05		2.05		6.10		8.05	
			AM	AM	AM	PM	PM	PM	PM	PM	PM

WESTBOUND monday through friday

Miles	WESTBOUND Time shown is that in effect in Chicago		254	256	258	160	62	262	264	164	66	168	268	170	274	174	276	182	284	186	286
			AM	AM	AM	AM	AM	AM	AM	AM	AM	AM	AM	PM	PM	PM	PM	PM	PM	PM	PM
0	Lv **SOUTH BEND**	Ind.					6.10				7.55										
4	Lv **Chain O'Lakes**	"																			
5	Lv **Lydick**	"					f 6.15														
12	Lv **NEW CARLISLE**	"					f 6.22				f 8.07										
13	Lv **Hudson Lake**	"					f 6.25														
14	Lv **Lake Park**	"					f 6.26														
17	Lv **Rolling Prairie** (Birchim)	"					f 6.29														
20	Lv **Smith**	"																			
21	Lv **Tee Lake**	"																			
23	Lv **LaLumiere**	"																			
26	Lv **Springville**	"																			
30	Lv **Sheps**	"	4.25	5.20	6.00		6.45	7.12	7.20		8.30		10.30		12.40		2.45		5.10		8.10
32	Lv **MICHIGAN CITY**	"	4.30	5.25	6.05		6.50	7.19	7.25		8.35		10.35		12.45		2.50		5.15		8.15
36	Lv **Pines** (Tamarack)	"		f 5.32	f 6.12																
38	Lv **Beverly Shores**	"	f 4.38	f 5.33	6.13		f 6.58		f 7.33		f 8.45		f 10.45		f 12.55		f 2.59		f 5.25		f 8.24
41	Lv **TREMONT** (The Dunes)	"	f 4.42	f 5.37	6.19		f 7.02	f 7.30	f 7.37		f 8.49		f 10.49		f 12.59		f 3.02		f 5.29		f 8.28
42	Lv **Port Chester**	"		f 5.39	f 6.22												f				
43	Lv **Dune Acres (Mineral Spgs.)**	"	f 4.46	f 5.41	f 6.24		f 7.04		f 7.39		f 8.53		f 10.53		f 1.03		f 3.06		f 5.33		
45	Lv **Bailly**	"		f 5.42	f 6.26		f 7.05						f 10.54				f 3.07		f 5.34		
48	Lv **Midwest** (Wilson)	"			f 6.28		f 7.06		f 7.44		f 8.55						f 3.08		f 5.38		
49	Lv **Ogden Dunes**	"	f 4.52	f 5.49	f 6.33		f 7.11		f 7.45		c 9.00		f 10.59		f 1.09		f 3.12		f 5.39		c 8.38
53	Lv **Miller**	"	f 4.57	f 5.55	f 6.39		f 7.16		f 7.50		f 9.04		f 11.04		f 1.14		f 3.17		f 5.44		f 8.43
57	Ar **GARY**	"	5.05	6.05	6.48		7.25	7.48	8.00		9.10		11.10		1.20		3.23		5.50		8.50
57	Lv **GARY**	"	5.05	6.05	6.48	7.05	7.25	7.48	8.00	8.20	9.10	10.15	11.10	12.30	1.20	2.20	3.23	4.25	5.50	6.50	8.50
58	Lv **Buchanan St.** (Gary)	"	f		f	f		f	f	f		f	f	f	f	f	f	f	f	f	f
59	Lv **Ambridge Ave.** (Gary)	"	f 5.08	f 6.09	f 6.51	f 7.09	f 7.28			f 8.24	f 9.13	f 10.19	f 11.13	f 12.34	f 1.23	f 2.24	f 3.26	f 4.28	f 5.53	f 6.53	f 8.54
60	Lv **Clark Road**	"	c 5.10	c 6.11	c 6.53	c				c 8.25		c 10.21	c 11.15	c 12.36		c 2.26	c 3.29	c 4.31		c 6.56	c 8.56
65	Lv **EAST CHICAGO**	"	5.14	6.16	6.57	7.15	7.35	7.58	8.10	8.30	9.20	10.25	11.20	12.40	1.30	2.30	3.35	4.35	6.00	7.00	9.00
67	Lv **HAMMOND**	"	5.18	6.21	7.02	7.20	7.40	8.02	8.15	8.35	9.25	10.30	11.25	12.45	1.35	2.35	3.40	4.40	6.05	7.05	9.05
69	Lv **HEGEWISCH**	ILL.	5.22	6.26	7.06	7.25	7.45		8.20	8.39	9.30	10.35	11.30	12.50	1.40	2.39	3.45	4.45	6.10	7.10	9.10
70	Lv **Calumet Harbor**	"					c			f 8.42		f 10.38	c	f 12.53				c		c	
74	Ar **KENSINGTON**	"	5.29	6.32	7.18	7.31	7.52	8.13	8.27	8.46	9.37	10.43	11.36	12.57	1.47	2.50	3.52	4.51	6.16	7.20	9.20
81	Ar **Woodlawn** (63rd St.)	"	5.38	6.42	7.27	7.42	8.02	8.22	8.37	8.56	9.47	10.51	11.46	1.07	1.57	3.00	4.02	5.00	6.25	7.30	9.30
82	Ar **57th St.** (Univ. of Chgo.)	"	5.40	6.44	7.29	7.44	8.04	8.24	8.39	8.58	9.49	10.54	11.48	1.09	1.59	3.02	4.04	5.02	6.27	7.32	9.32
88	Ar **Roosevelt Rd.** (Cen. Sta.)	"	5.46	6.51	7.36	7.51	8.11	8.31	8.46	9.05	9.56	11.01	11.55	1.16	2.06	3.09	4.11	5.10	6.35	7.39	9.39
88	Ar **Van Buren St.**	"	5.48	6.53	7.38	7.53	8.13	8.33	8.48	9.07	9.58	11.03	11.57	1.18	2.08	3.11	4.13	5.12	6.37	7.41	9.41
88	Ar **Randolph St.**	"	5.50	6.55	7.40	7.55	8.15	8.35	8.50	9.09	10.00	11.05	11.59	1.20	2.10	3.13	4.15	5.15	6.40	7.43	9.43
	CHICAGO	Ill.	AM	AM	AM	AM	AM	AM	AM	AM	AM	AM	AM	PM	PM	PM	PM	PM	PM	PM	PM

subject to change without notice

weekends & holidays

Miles	WESTBOUND Time shown is that in effect in Chicago		358	462	364	366	368	468	370	480	484
			AM	AM	AM	AM	AM	AM	PM	PM	PM
0	Lv **SOUTH BEND**	Ind.	......	6.40	Runs Saturdays Only	......	Runs Saturdays Only	10.35	......	4.40	6.35
4	Lv **Chain O'Lakes**	"	......	......		......		......	......	......	......
5	Lv **Lydick**	"	......	f 6.45		......		f 10.40	......	f 4.45	f 6.40
12	Lv **NEW CARLISLE**	"	......	f 6.52		......		f 10.47	......	f 4.52	f 6.47
13	Lv **Hudson Lake**	"	......	......		......		f 10.50	......	f 4.55	f 6.50
14	Lv **Lake Park**	"	......	f 6.56		......		f 10.51	......	f 4.56	f 6.51
17	Lv **Rolling Prairie** (Birchim)	"	......	f 6.59	......	......		f 10.54	......	f 4.59	f 6.54
20	Lv **Smith**	"	......	......	......	......		......	......	f 5.02	......
21	Lv **Tee Lake**	"	......	......	......	......		......	......	......	......
23	Lv **LaLumiere**	"	......	......	......	......		......	......	......	......
26	Lv **Springville**	"	......	......	......	......		......	......	......	......
30	Lv **Shops**	"	5.50	7.15	8.15	9.05	10.05	11.10	2.15	5.15	7.10
32	Lv **MICHIGAN CITY**	"	5.55	7.20	8.20	9.10	10.10	11.15	2.20	5.20	7.15
36	Lv **Pines** (Tamarack)	"	......	......	......	......	......	......	......	......	......
38	Lv **Beverly Shores**	"	f 6.05	f 7.30	f 8.30	f 9.20	f 10.20	f 11.25	f 2.30	f 5.30	f 7.25
41	Lv **TREMONT** (The Dunes)	"	f 6.09	f 7.34	f 8.34	f 9.24	f 10.24	f 11.29	f 2.34	f 5.34	f 7.29
42	Lv **Port Chester**	"	f	......	......	......	f	f	......	......	f
43	Lv **Dune Acres (Mineral Spgs.)**	"	f 6.12	f 7.37	f 8.37	f 9.27	f 10.27	f 11.32	f 2.37	f 5.37	f 7.32
45	Lv **Bailly**	"	f 6.13	f 7.38	......	f 9.28	f 10.28	f 11.33	......	f 5.38	f 7.33
48	Lv **Midwest** (Wilson)	"	f 6.17	f 7.39	f 8.42	f 9.32	f 10.29	f 11.35	f 2.42	......	f 7.35
49	Lv **Ogden Dunes**	"	f 6.19	f 7.44	f 8.44	f 9.34	f 10.34	f 11.39	f 2.44	f 5.44	f 7.39
53	Lv **Miller**	"	f 6.24	f 7.48	f 8.48	f 9.38	f 10.38	f 11.44	f 2.49	f 5.49	f 7.44
57	Ar **GARY**	"	6.30	7.55	8.55	9.45	10.45	11.50	2.55	5.55	7.50
57	Lv **GARY**	"	6.30	7.55	8.55	9.45	10.45	11.50	2.55	5.55	7.50
58	Lv **Buchanan St.** (Gary)	"	f	o	f	f	f	f	f	f	f
59	Lv **Ambridge Ave.** (Gary)	"	f	o	f 8.58	f 9.48	f 10.48	f 11.53	f 2.58	f 5.58	f 7.53
60	Lv **Clark Road**	"	c 6.35	......	c 9.01	c 9.51	c 10.51	c 11.56	c 3.01	c 6.01	c 7.56
65	Lv **EAST CHICAGO**	"	6.40	8.05	9.05	9.55	10.55	12.00	3.05	6.05	8.00
67	Lv **HAMMOND**	"	6.45	8.10	9.10	10.00	11.00	12.05	3.10	6.10	8.05
69	Lv **HEGEWISCH**	ILL.	6.50	8.15	9.15	10.05	11.05	12.10	3.15	6.15	8.10
70	Lv **Calumet Harbor**	"	c 6.53	......	......	f 10.08	......	f 12.13	f 3.18	......	c 8.13
74	Ar **KENSINGTON**	"	6.58	8.23	9.23	10.13	11.11	12.18	3.23	6.23	8.18
81	Ar **Woodlawn** (63rd St.)	"	7.06	8.32	9.31	10.21	11.21	12.26	3.31	6.32	8.27
82	Ar **57th St.** (Univ. of Chgo.)	"	7.08	8.34	9.33	10.23	11.23	12.28	3.33	6.34	8.29
88	Ar **Roosevelt Rd.** (Cen. Sta.)	"	7.16	8.41	9.41	10.31	11.30	12.35	3.40	6.41	8.36
88	Ar **Van Buren St.**	"	7.18	8.43	9.43	10.33	11.32	12.37	3.42	6.43	8.38
88	Ar **Randolph St.**	"	7.20	8.45	9.45	10.35	11.34	12.39	3.45	6.45	8.40
	CHICAGO	Ill.	AM	AM	AM	AM	AM	PM	PM	PM	PM

APPENDIX E

Stations	February		June	
	On	Off	On	Off
Randolph				
Van Buren				
Roosevelt Road	64,671	61,019	66,355	65,075
57th Street	1,810	1,758	1,828	2,020
63rd Street	754	1,077	867	1,047
Kensington	1,374	1,373	1,357	1,340
Calumet Harbor	11	22	7	3
Hegewisch	8,391	10,010	8,298	9,414
Hammond	9,543	10,556	9,851	10,832
East Chicago	16,443	17,153	16,955	17,342
Clark Road	1,761	1,908	2,097	2,301
Ambridge	715	799	777	821
Buchanan Street	945	904	1,114	1,161
Gary	16,771	16,814	17,229	17,257
Miller	4,097	3,661	4,398	3,784
Ogden Dunes	1,477	1,320	1,470	1,383
Midwest	1	28	2	25
Bailly	139	156	132	149
Dune Acres	780	850	904	819
Port Chester	23	88	31	103
Tremont	1,132	1,098	1,218	1,234
Beverly Shores	879	788	948	915
Pines	----	38	1	8
Michigan City	4,483	4,454	4,887	5,041
Shops	2,138	2,219	2,376	2,118
Springville	1	---	---	---
LaLumiere	---	81	3	8
Tee Lake	---	---	---	---
Smith	---	---	---	1
Birchin	25	25	44	13
Lake Park	3	3	7	5
Hudson Lake	11	23	25	22
New Carlisle	10	10	18	8
Lydick	3	4	10	9
Chain O'Lakes	---	---	---	---
South Bend	1,727	1,746	1,940	1,826
Totals	140,118	139,985	145,149	146,084

APPENDIX F

Chicago South Shore and South Bend Railroad Passenger Station Data

Station	Ticket office hours	Public access station facilities	Schedule information during nonticket office hours	Public telephone available
Randolph Street	9:00 AM - 12:30 PM 12:30 PM - 6:00 Daily	24 hours daily	Chicago and General Transportation information number shown in public timetable.	24 hours daily
*Hegewisch	6:00 AM - 2:00 PM Ex. SSH	5:00 AM - 10:00 PM Ex. Sunday 5:00 AM - 1:00 PM Sundays	Chicago and General Transportation information number shown in public timetable.	24 hours daily
Hammond	6:00 AM - 2:00 PM Ex. SSH	Station during ticket office hours - waiting room 24 hours daily.	Recorded message on station telephone	24 hours daily
East Chicago	5:15 AM - 1:15 PM Ex. Sundays & Holidays	Station during ticket office hours - waiting area 24 hours daily-equipped with infra-red heaters.	Recorded message on station telephone	24 hours daily
Gary	5:20 AM - 1:20 PM Daily	Station during ticket office hours - waiting room 24 hours daily.	Recorded message on station telephone	24 hours daily
Michigan City	6:00 AM - 2:00 PM Ex. Sundays & Holidays	Station during ticket office hours - waiting room 24 hours daily.	Recorded message on station telephone	24 hours daily
**South Bend	6:00 AM - 11:00 AM 12:00 noon - 3:00 PM Ex. SSH	6:00 AM - 5:00 PM Ex. SSH 9:00 AM - 5:00 PM SSH	Recorded message on station telephone	24 hours daily

*Concession operator opens and closes station.

**Joint station facility with Amtrak.

NOTE: South Shore passenger tickets are available through Illinois Central Gulf ticket offices at Van Buren Street Station, Chicago, 24 hours daily, and Kensington Station, Chicago, 6 AM to 10 AM Monday through Friday, 6 AM to 2 PM Saturdays.

FINANCE DOCKET NO. 28250[1]

NEW YORK DOCK RAILWAY—CONTROL—BROOKLYN EASTERN DISTRICT TERMINAL

Decided April 11, 1978

1. In Finance Docket No. 28250, acquisition by New York Dock Railway of control of Brooklyn Eastern District Terminal through stock ownership, approved and authorized subject to conditions.
2. In Finance Docket No. 28294, authority granted to New York Dock Railway to issue a secured promissory note in the principal amount of $1,277,040.

Stuart H. Johnson, Jr., and *Christine A. Pasquariello* for applicant New York Dock Railway.

Carolyn C. Cox and *David A. Sutherland* for the Minority Shareholders of Brooklyn Eastern District Terminal.

Jack R. Turney, Jr., for Phelps Dodge Products Corporation.

John O'B. Clarke and *William G. Mahoney* for interveners Railway Labor Executives' Association and Brotherhood of Railway and Airline Clerks.

DECISION

The Minority Shareholders of Brooklyn Eastern District Terminal (MS), Phelps Dodge Products Corporation (PD), and interveners Railway Labor Executives' Association (RLEA) and the Brotherhood of Railway and Airline Clerks (BRAC) jointly, all of whom opposed the application, have filed exceptions to the initial decision of the Administrative Law Judge. In response, applicant New York Dock Railway (Dock) has filed a reply.

The Administrative Law Judge's decision correctly sets forth the facts relating to the relevant operations and financial conditions of applicants and Dock's parent, NYD Properties (Properties), and the terms and conditions of the transactions. We have repeated only those facts which clarify our discussion. We partially concur with the Administrative Law Judge's decision and to the extent his findings and conclusions agree with ours, we affirm and adopt his initial decision as our own.

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[1] This decision embraces Finance Docket No. 28294, New York Dock Railway—Securities.

By an application filed August 3, 1976, in Finance Docket No. 28250, as amended, Dock, of New York, NY, seeks authority under section 5(2) of the Interstate Commerce Act to acquire control of the Brooklyn Eastern District Terminal (BEDT), also of New York, NY, through the purchase of the latter's outstanding capital stock.

By an application filed September 15, 1976, in Finance Docket No. 28294, as amended, Dock also seeks authority under section 20(a) of the Interstate Commerce Act to issue a secured promissory note to the Chemical Bank of New York in the amount of $1,277,040.

STATEMENT OF THE CASE

The two related applications were consolidated and an oral hearing was held in New York, NY between February 8 and February 18, 1977. Oliver Carey (president and chief operating officer of Dock and its parent Properties), Local 1814 of the International Longshoremen's Association, and several shippers, shipping associations, and local and State agencies and councils appeared in support of the application. Appearing in opposition were a group of shippers utilizing the services of BEDT including PD, and MS (a group of minority stockholders holding approximately 35 percent of BEDT's stock) and interveners RLEA and BRAC.

The Administrative Law Judge granted both applications in an initial decision entered May 13, 1977. He approved the control application imposing conditions for the protection of employees and subjecting Properties to Commission jurisdiction under section 5(3) of the act. Subsequently, MS, PD, RLEA, and BRAC filed exceptions and in response Dock filed a reply which we will discuss later. On September 26, 1977. we entered an order affirming the Administrative Law Judge's initial decision with the exception of substituting different labor protective conditions for those imposed by the Administrative Law Judge. We issued this order effective September 28, 1977 prior to our completing this decision, which will detail our findings of fact and conclusions, because delay was tantamount to a denial of the applications. On September 29, 1977, following RLEA's petition for stay, we entered an order (1) permitting the applicants to consummate the transactions, (2) staying the effective date of its September 26, 1977 order with respect to the imposition of labor conditions, and (3) prohibting the applicants from action which would affect employee rights until the Commission acts on the Petition for Administrative Review and the reply subsequently filed by RLEA and Dock respectively. The petition and reply are being held in abeyance until after service of this decision.

THE EVIDENCE

Dock is a stock corporation organized under the laws of the State of New York. Its outstanding capital stock is owned by Properties whose capital stock, in turn, is owned by Oliver Carey, president and chief operating officer of both corporate entities. The corporations engage only in rail-marine operations and are not affiliated with any other carrier or corporate enterprise. Neither Properties nor Carey signed the application; but, as previously indicated, Carey appeared at the hearing presenting information on Dock, Properties, and himself and was subject to discovery and cross-examination.

BEDT also is a stock corporation organized under the laws of the State of New York. Approximately 50 percent of its capital stock is owned by the Petroleum Heat & Power Company (Petro)[2], a Delaware corporation with headquarters in Stamford, CT. The remainder of its stock is held by various trustees and individuals including protestant MS, who own approximately 35 percent of BEDT's capital stock.

In September 1976, Dock's financial condition showed negative working capital, over-capitalization, and negative net worth. However on a consolidated basis with its parent, Properties, the situation was more favorable showing a profitable operation and adequate capitalization and benefit from a favorable long-term lease of necessary transportation facilities from the port authority.[3] Also, Dock will receive between $225,000 and $250,000 from a pension fund surplus in 1977. Formerly profitable, Dock showed losses in 1974 and 1975, but it anticipates increased revenues from the proposed coordination of transharbor operations. In addition, Properties will continue to provide any necessary financial assistance for Dock's operations.

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[2] Petro is a subsidiary in a chain of commonly controlled corporations. It is directly owned by Signal Oil & Gas Company, which is a subsidiary of Burmah Oil & Gas Company. During July 1976, R. J. Reynolds Industries, Inc., acquired control of Burmah Oil & Gas Company from its parent, Burmah Oil Company.

[3] The consolidated financial picture appears more favorable considering the proposed loan agreement by a reputable financial institution.

The proposed transaction results from an agreement initially entered on June 28, 1976 by Dock and Petro for Dock's purchase of Petro's 50-percent interest in the outstanding capital stock of BEDT. Under the agreement, Dock also would purchase from Petro certain first-mortgage bonds of BEDT with a face value of $717,900. In December 1976, the parties renegotiated the transaction and, on January 11, 1977, amended their agreement concerning the proposed purchase of stock; subsequently, they amended the applications to conform to the amended agreement.

Under the new terms, Dock has agreed to make a tender offer for 100 percent of the 33,852 shares of BEDT capital stock outstanding for $20 per share and Petro has agreed to tender its 16,926 shares of BEDT stock. The parties also have agreed that Dock would buy $717,900 of BEDT first-mortgage bonds from Petro for $600,000. Dock made no offer to purchase the balance of the outstanding bonds of BEDT.

The tender offer was contingent initially upon applicants' receiving approval of the Interstate Commerce Commission and the New York State Department of Tansportation on or before June 30, 1977; however, the parties subsequently extended the expiration date.

Dock and BEDT have conducted similar rail-marine operations from adjacent terminals on the Brooklyn waterfront. Dock interchanges cars with the Consolidated Rail Corporation (ConRail) and with the Baltimore and Ohio Railroad Company at their respective terminals at Greenville, NJ and St. George (Staten Island), NY transferring the cars to and from its Fulton, Atlantic, and Bush terminals in Brooklyn. Dock furnishes the marine equipment, tugs and carfloats, and it maintains float bridges at its Brooklyn terminals. BEDT also operates carfloat service between the Greenville and St. George terminals and its Kent Avenue, Pigeon Street, and Navy Yard terminals in Brooklyn. In addition, it has operated the Greenville Maine Terminal facility for ConRail under a contractual agreement and also has provided limited lighterage service.

Dock intends to control the entire property of BEDT through its acquisition of a controlling equity interest. However, Dock and BEDT do not intend to merge or consolidate their companies in the foreseeable future and thus would continue to operate as separate and distinct corporations. Dock believes that the transaction would have no adverse effect upon carrier employees because each carrier is bound by the terms and conditions of various agreements with its own employees and does not intend to curtail existing operations. It also believes that its proposed control of BEDT would permit a more efficient use and maintenance of present equipment of the two carriers, a more expeditious flow of service, better use of the floating equipment now in use in these operations, a reduction in the future need for substantial capital investments, improved control of fixed charges, and a resulting improvement in earnings. Its beliefs are supported by United States Railway Association's "Final System Plan," Vol. II, p. 238 (July 26, 1975).

The proposed loan agreement between Dock and the Chemical Bank calls for a note in the amount of $1,277,040 for the purchase of the 33,852 shares of outstanding BEDT common stock, plus the first-mortgage bonds of BEDT with face value of $717,900 due December 1, 1979. Dock would issue a secured promissory note for a 5-year term at an interest rate equal to the prime rate plus a 2-percent premium, with a 7-year payout option for Dock. In the first year, Dock would be obligated to pay principal of $45,600 plus an interest payment of $29,525,[4] for a total of $75,125. In succeeding years, the total payments range from a high of $289,960 in the second year to a low of $239,350 in the fifth year. Unless the payment schedule were extended, a balloon payment of $533,480 would be payable in the sixth year.

THE ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge, in granting both applications, imposed labor protective conditions and subjected Properties to Commission jurisdiction under section 5(3)[5] of the act. In reaching his decision, the Administrative Law Judge found that the technical failure to join Properties as a party to the control application was not a defect inasmuch as Properties actually prosecuted the application, and thus he could subject Properties to section 5(3) of the act. In addition, he considered the condition of financially poor Dock and its financially capable parent, Properties, on a consolidated basis and found that Dock was financially fit to consummate the transaction. Also, the Administrative Law Judge found that the evidence did not indicate that Dock would cause BEDT to discontinue lighterage service to PD and that BEDT's parent, Petro, had done nothing harmful to the intersts of BEDT or MS in negotiating the control agreement. Finally, the

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[4] The interest projections are based on a prime interest rate of 7 1/4.

[5] Now section 5(4) under the 1976 Amendment of the Interstate Commerce Act.

Administrative Law Judge rejecting the labor protective conditions proposed by RLEA and BRAC (set forth in appendix I) and imposed the "New Orleans" labor protective conditions[6] indicated in appendix II of *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557, 588 (1962) augmented by appendix C-1 conditions of the National Railroad Passenger Corporation Agreement ("Amtrak" conditions) with some modifications (as indicated in appendix II).

EXCEPTIONS

The exceptions raised the following issues:

I. Should the Commission dismiss the control application because Properties failed to join formally in the application?

II. Should the Commission consider the financial resources of Properties regarding the financial capabilities of dock?

III. Do the terms of the control transaction subject MS to undue or unfair risk or advantage?

IV. Should the Commission impose a condition prohibiting BEDT from restricting or discontinuing lighterage service to shipper PD?

V. What are the appropriate employee protective conditions for the Commission to impose in certain cases under section 5(2) of the act?

In addition, we have considered other contentions raised by the parties and, finding them unpersuasive, have not included them in our following discussion.

DISCUSSION AND CONCLUSIONS

I. *Joinder of parties.*—Both MS and PD have argued that the application should have been dismissed under the rule established in *United States* v. *Marshall Transport Co.*, 322 U.S. 31, 41-42 (1944), because Properties failed to file an application or join formally in Dock's application.

In *Marshall,* a vendee-carrier applied for authority to control a vendor-carrier. Vendee was controlled by a noncarrier which did not join in the application. After hearing, the Commission found that it could not approve the application in the absence of an appropriate application by the real party in interst, the noncarrier parent. The Commission gave the parent 20 days in which to file an application and avoid dismissal of the control application. The parent did not file and subsequently appealed the Commission's dismissal.

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[6] The Commission initially promulgated the "New Orleans" conditions in *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271 (1952).

The Supreme Court upholding the dismissal indicated that the Commission was *without authority* to approve such control unless the noncarrier parent joined in the application with the Commission. Although mentioning that an application by the parent was required by section 5(2) of the act, the Court's primary concern was assuring subjection of the noncarrier to the order so that it could be subjected subsequently to the Commission's jurisdiction under current section 5(4) of the act. The "without authority" language used by the Court indicated that the Commission lacks jurisdiction to consider an application when the real party in interest fails to join.

However, the decision in ***Alleghany Corp.* v. *Breswick & Co.*,** 353 U.S. 151, 171-172 (1957), casts doubt on the jurisdictional interpretation of ***Marshall.*** Alleghany, a noncarrier holding company, had been subjected to the Commission's jurisdiction under current section 5(4) in a previous control proceeding. Subsequently, Alleghany filed an application with the Commission for authority to issue preferred stock. Following approval of the application, a group of minority shareholders challenged the Commission's authority to approve the stock issuance. They argued that because Allegany's two controlling stockholders had failed to join in the control application, the Commission had no authority to subject Alleghany to the Commission's jurisdiction and, thus, the Commission had no jurisdiction to decide the subsequent stock application. The Supreme Court indicated that, in ***Marshall,*** the Commission properly had exercised its power to refuse approval of a subsidiary's application to acquire control of the property and operating rights of another carrier unless the noncarrier parent submitted itself to the Commission's jurisdiction. Although noting that ***Marshall*** contained a jurisdictional reference, the Court stated that the problem is not strictly jurisdictional. It indicated that the Commission's jurisdiction over a noncarrier depends not on the action of the noncarrier but on whether its activities fall within sections 5(2) and current (4). Although two stockholders failed to join in the application, the Commission retained jurisdiction over Alleghany. Interpreting ***Marshall*** as not placing a limit on the Commission's jurisdiction, the ***Alleghany*** case was later followed in ***Yale Transportation Corp.* v. *United States,*** 185 F. Supp. 96 (1960), and ***Piedmont Motor Lines, Inc.—Pur.—Spartan Exp., Inc.,*** 97 M.C.C. 49 (1964).

Joinder serves two purposes. First, it gives the Commission the power to impose section 5(4) jurisdiction on the noncarrier. Second, it gives opponents a chance for discovery and cross-examination and thus develops the information necessary for the Commission to determine if the noncarrier control will be consistent with the public interest. Here, the Administrative Law Judge could have dismissed the application. However, the application indicated that Properties was Dock's parent. Furthermore, at the hearing Mr. Carey, the owner of Dock and Properties, presented financial information and subsequently was cross-examined at length on the close relationship between the two companies. The Administrative Law Judge indicated that "for all practical purposes, if not in form, this application has been prosecuted as though Properties and Oliver Carey, its sole stockholder, were joint applicants." The Administrative Law Judge felt that the presentation of sufficient evidence enabled him to find that control by Properties was consistent with the public-interest, and that he should subject it to the terms of current section 5(4) of the act. To accomplish the latter, the Administrative Law Judge conditioned approval upon Properties' assent to the terms of current section 5(4). This cured the defect of nonjoinder. Here, the failure of joinder did not prejudice the opponents and, thus, the Administrative Law Judge's finding was proper.

II. *Financial fitness.*—MS have argued that the Administrative Law Judge improperly considered the financial resources of Properties in finding that Dock was financially fit. Citing *Watkins-Control—Fleming's Transfer,* 109 M.C.C. 254 (1969), MS have contended that the Commission will not consider the financial resources of stockholders in determining the financial fitness of an applicant. While MS correctly state the longstanding general rule, the Commission has permitted an exception. Where a vendee's stockholders have committed themselves to make a sufficient contribution to its capital and have shown that they possess adequate liquid assets to do so, these facts warrant consideration in determining the financial ability of the purchaser, see *Plains Motor Exp., Inc.—Pur.—C & G Truck Line, Inc.,* 87 M.C.C. 489, 494 (1961).

In *Trailways of New England, Inc.—Pur.—Boston & M. Transp.,* 80 M.C.C. 697 (1959), the vendee was not financially fit in its own right. However, the vendee and its corporate parents were bus companies, and the vendee was a vital link in the coordinated transportation service which its stockholders were rendering in competition with Greyhound. After noting the mutual dependency of the vendee and its corporate parents, the Commission indicated that the application is predicated on its two parents providing the vendee with whatever financial support is necessary to place certain operations of three companies on a paying basis. In addition, it indicated that one parent was obligated to guarantee the vendee's payment of the purchase price. Under the circumstances, the Commission found the vendee financially fit.

In *Hove Truck Line—Purchase—Maurer,* 97 M.C.C. 361, 365-366 (1965), Hove applied for authority to purchase certain operating rights and equipment. Hove would receive the operating rights and its wholly owned subsidiary, Hove Equipment Company, would receive the equipment. Hove, by itself, was unable to meet the purchase price. However, the Commission indicated that whenever necessary the two companies transferred funds to each other. Notwithstanding the general policy of considering the acquiring carrier's financial fitness on its own merits, on the peculiar facts of the case, the Commission disregarded the individual corporate structures of the two companies and considered them as a single entity regarding the issue of financial fitness. The Commission thus found Hove financially fit.

In the instant case, Properties will guarantee Dock's note to Chemical Bank and has a history of advancing money to keep its subsidiary solvent. Although advances are carried on New York Dock's hooks as debt, it is payable only when applicant has sufficient profits. Properties' legal obligation as guarantor along with the history of advancing funds to Dock brings the instant case squarely within the exceptions of *Trailways* and *Hove.* Therefore, the Administrative Law Judge properly considered the financial resources of Properties in finding Dock financially fit.

The Commission is concerned that acquisitions by noncarrier holding companies could weaken the carrier system and render it incapable of responding to the needs of the public. While we do not view mere potential improprieties as a bar to our approval, we are concerned about the carriers here and their relationship to Properties. Therefore, we have conditioned our approval to provide that BEDT and to the extent appropriate, any carrier under the control of Properties should not, without the express approval of the Commission, (1) pay any dividend in cash or otherwise in excess of 50 percent of its earnings in that dividend period, (2) make any advances, whether in cash or property, to its parent, subsidiary or affiliated companies, (3) encumber any of its assets or the assets of any of its subsidiary or affiliated companies for noncarrier purposes, or (4) engage in any other monetary or property transactions with its parent company or within its system of carrier and noncarrier companies, except those transactions considered necessary in the ordinary course of its motor carrier business.

III. *Protection of minority shareholder interests.*—MS have challenged the Administrative Law Judge's finding that the terms of the control transaction do not subject them "to undue or unfair risk or disadvantage." They have argued that inasmuch as the tender price approximates only 50 percent of the per-share book value of BEDT, the Administrative Law Judge failed to protect the interests of MS. In support, they cite *Schwabacher et al.* v. *United States et al.*, 334 U.S. 182 (1948). In this case the Supreme Court approved a railroad merger holding that the Commission must protect the rights and interests of miniority shareholders. The Commission must find that the terms of the proposed merger are just and reasonable by giving the shareholders the full economic equivalent of their holdings. MS argues that the $20 per share tender offer is not the full economic equivalent of their holdings contend that the Commission cannot approve the control application. Contrary to their contention, the *Schwabacher* rationale does not control because the proposed transaction does not involve complusion through liquidation of shareholder interests. Here, the Commission does not have to protect the interests of minority shareholders.

The true value of BEDT stock is difficult to determine because no market exists for the stock, it has not paid dividends for several years, and no other offers have been made for the stock. In such circumstances, the Commission scrutinizes the bargaining that led to the price, and if the parties have conducted "at arms length" negotiations, the Commission presumes that the price is reasonable. Here, the Administrative Law Judge found that Dock complied with the law by participating in "arm-length" negotiations for control of BEDT. The Administrative Law Judge also found that the tender offer gives MS a valuable new liquidity by offering them $20 per share. Thus, the shareholders can choose to accept the offer or retain their stock with its underlying book value and potential liquidation or speculative value for the future. If the parties propose a merger in the future, the protections of *Schwabacher* will apply. In any section 5(2) transaction, the Commission must find that the terms are just and reasonable and here the evidence supports the finding of the Administrative Law Judge.

IV. *Guarantee of continued service.*—PD argues that the Administrative Law Judge should have imposed a condition by tariff or otherwise that BEDT under Dock's control should not restrict or discontinue the lighterage service provided to PD. The Administrative Law Judge found that there was no evidence indicating that the service would end. In our opinion, PD's proposed condition is an attempt to guarantee the continuation of BEDT's service at the same rate. If the lighterage service is compensatory, there is no reason why BEDT would discontinue it. Thus, the evidence does not warrant the proposed condition.

V. *Labor protective conditions.*—RLEA and BRAC have challenged the labor protective conditions imposed by the Administrative Law Judge. As previously indicated, he imposed the "New Orleans" conditions set forth in appendix II of *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557 (1962), augmented by the "Amtrak" conditions with some modification. When we entered our emergency order on September 26, 1977, we substituted the entire "Amtrak" conditions for those imposed by the Administrative Law Judge. However, since that time, we have reviewed the issue further and have decided to modify that segment of our order.

Section 5(2)(f) of the Interstate Commerce Act, enacted in 1940, governs labor protective conditions in railroad transactions. Pursuant to section 5(2)(f), the Commission must assure fair and equitable treatment for employees affected by these transactions. In its orders, the Commission must impose terms and conditions which permit the affected employee to maintain essentially the same financial position for the lesser of (1) 4 years from the effective date of the Commission order or (2) the time worked by the employee prior to that date. In 1976, Congress amended section 5(2)(f) and now the Commission also must impose conditions which contain the same protections (1) imposed previously pursuant to this section and (2) established pursuant to section 405 of the Rail Passenger Service Act of 1970 (RPSA).[7] Section 5(2)(f) sets forth the minimum standard of protection; not the maximum rights for employees, *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 331 I.C.C. 151, 161 (1967). Thus, should situations require, the Commission can provide the employees with more protection than the statutory minimum, *Norfolk & Western Railroad Co.* v. *Nemitz*, 404 U.S. 37, 42 (1971).

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[7] Public Law No. 91-518, 84 Stat. 1327 (Oct. 30, 1970); Public Law 92-316, 7, 8; 86 Stat. 230 (June 22, 1972); 45 U.S.C. 565.

To facilitate understanding of section 5(2)(f), we briefly will review the history of the development of labor protective conditions in railroad transactions. Prior to the enactment of section 5(2)(f), the Agreement of May, 1936, Washington, D.C. (The Washington Job Agreement) was the first pronouncement involving conditions for the protection of railroad employees. This agreement between most of the railroads and the employee brotherhoods set forth protective conditions for employees affected by coordination. Coordination occurred when two or more railroads jointly acted to unify, consolidate, merge, or pool all or any operations of services previously performed through their separate facilities. Coverage under the Washington Job Agreement continued for a period up to 5 years from the date of adverse affect. Sections 4 and 5, in particular, provided for 90-day notice to employees, negotiation of implementing agreements, and arbitration.[8] Other provisions generally concerned allowances for displaced and deprived employees, fringe benefits, home allowances, moving and traveling expenses, and a procedure for arbitration.

Following enactment of section 5(2)(f), the Commission in *Oklahoma Ry. Co. Trustees Abandonment,* 257 I.C.C. 177 (1944), imposed labor protective conditions similar to those in the Washington Job Agreement with exceptions concerning exercise of seniority rights, computation of dismissal and displacement allowances and arbitration procedure. The "Oklahoma" conditions provided employee protection for up to 4 years from the effective date of the Commission's order or the length of employment prior to that date, whichever is less.[9]

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[8] *The Washington Job Agreement (1936)—Sections 4 and 5*

SECTION 4.—Each carrier contemplating a coordination shall give at least ninety (90) days' written notice of such intended coordination by posting a notice on bulletin boards convenient to the interested employees of each such carrier and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be effected by such coordination, including an estimate of the number of employees of each class affected by the intended changes. The date and place of a conference between representatives of all the parties interested in such intended changes for the purpose of reaching agreements with respect to the application thereto of the terms and conditions of this agreement, shall be agreed upon within ten (10) days after the receipt of said notice, and conference shall commence within thirty (30) days from the date of such notice.

SECTION 5.—Each plan of coordination which results in the displacement of employees or rearrangement of forces shall provide for the selection of forces from the employees of all the carriers involved on bases accepted as appropriate for application in the particular case; and any assignment of employees made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organization of the employees affected, parties hereto. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.

Subsequently, in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952), the Commission found that the "Oklahoma" conditions contained the minimum standard of employee protection. However, eliminating the possibility of duplicate benefits, it superimposed the "Oklahoma" conditions upon the provisions of the Washington Job Agreement. The "New Orleans" conditions included the Oklahoma method of computing displacement allowances and the Washington Job Agreement protective period of up to 5 years from the date of adverse effect. By imposing the "New Orleans" conditions, the Commission protected employees adversely affected near the end of the "Oklahoma" protective period who otherwise would have received little or no protection under the "Oklahoma" conditions.

In *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 331 I.C.C. 151, 163-169 (1967), the Commission reviewed its earlier decision imposing the "New Orleans" conditions. The transaction involved (1) consolidation of separate facilities and employee rosters of the two railroads *without prior negotiation* with the labor organizations and (2) the transferral of work and employees from one railroad to another. Expressly imposing sections 4 and 5 (as modified to require compulsory arbitration), the Commission explained that the employee rights to notice and negotiation were indispensible prerequisities to approval of the transaction. Thus, the Commission exercised its prerogative to increase employee protection in a control case involving coordination of separate facilities and senority rosters, *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142 (1950). Similar situations can arise in other railroad transactions which require Commission approval under section 5(2)(a)(i) of the Interstate Commerce Act.[10]

Section 405 of RPSA was enacted to include labor protective conditions developed earlier under section 5(2)(f). Appendix C-1, developed pursuant to section 405, increased employee protection by extending the protective period to 6 years from the date of his adverse affect or the length of employment prior to that date, whichever is less. The provisions of appendix C-1, known as the "Amtrak" conditions, apply to discontinuances of intercity rail passenger service. As previously indicated, the 1976 amendment of section 5(2)(f) expressly includes protections developed pursuant to section 405 and thus we imposed these "Amtrak conditions" in our order of September 26, 1977. Subsequently, we have reviewed this matter and conclude that we should modify that order.

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[9] The Commission also has imposed similar conditions in abandonment proceedings under section 1a of the Interstate Commerce Act. *Chicago B. & Q. R. Co. Abandonment*, 257 I.C.C. 700 (1944).

[10] In addition, the Commission is considering appropriate labor protective conditions for imposition in abandonments under section 1(a) of the act, docket No. AB-36 (Sub-No. 2), Oregon Short Line R. Co.—Abandonment—Goshen and trackage rights under section 5(2)(a)(ii), Finance Docket No. 28387, Norfolk and Western Ry. Co.—Trackage Rights—BN.

In *Congress of Railroad Unions* v. *Hodgson*, 326 F. Supp. 68, 74-75 (1971), the district court held that appendix C-1 conditions did not include the provisions of sections 4 and 5 of the Washington Job Agreement. In reaching its decision, the court indicated that time constraints involved in starting passenger service following enactment of RPSA precluded inclusion of the longer notice, negotiation, and arbitration requirements of sections 4 and 5. Because the 1976 amendment of section 5(2)(f) requires that protection must include conditions imposed previously under the section, we should have included this additional protection which the Commission expressly imposed previously in the second *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, case *supra*.

When sections 4 and 5 of the Washington Job Agreement are combined with the provisions of appendix C-1, the combined provisions still contain inappropriate references applicable to "Amtrak" transactions. Therefore, we have eliminated these inapplicable references in prescribing appropriate labor protective conditions for applicable railroad transactions under section 5(2)(a)(i) of the Interstate Commerce Act. We have set forth these labor protective conditions in appendix III of this decision.

In our order entered September 29, 1977 (served October 5, 1977), we authorized the applicants to consummate the control case; however, we prohibited them from taking action that would affect employee rights until the Commission acts on RLEA's subsequently filed petition for discretionary review. Because the applicants may have taken steps to consummate the transaction, we have exempted them from the strict compliance with the particular requirements of article I, section 4, of the conditions set forth in appendix III. However, in fairness to employees, we have not exempted the applicants from an equitable application of these procedural requirements. Therefore, we have retained jurisdiction over these matters for 90 days from the effective date of our decision. During this 90-day period, the applicants and the employees, or their representatives, will follow the procedure set forth in article I, section 4, of the conditions set forth in appendix

III. This will allow the applicants in Finance Docket No. 28250 to comply substantively with the protective procedures.

It is ordered:

(1) Brooklyn Eastern District Terminal and to the extent appropriate, any motor carrier under the control of NYD Properties, Inc. shall not, without the express approval of this Commission, (1) pay any dividend in cash or otherwise in excess of 50 percent of its earning in that dividend period, (2) make any advances, in cash or property, to subsidiary, parent or affiliated companies, (3) encumber any of its assets or the assets of any of its subsidiary or affiliated companies for noncarrier purposes or (4) engage in any other monetary or property transactions with its parent company or within its system of carrier and noncarrier companies, except those transactions considered necessary to and conducted normally in the course of its motor carrier business.

(2) The conditions for the protection of employees set forth in appendix III of this decision, as applied in this report to Finance Docket No. 28250, be substituted for those imposed in our order entered September 26, 1977 (served September 28, 1978).

(3) Except as modified by this decision, the order entered September 26, 1977, shall remain in full force and effect.

(4) This decision shall be effective 20 days from the date of service.

(5) Pursuant to the notice to the parties dated March 2, 1978, Railway Labor Executives Association and New York Dock Railway may supplement the petition for administrative review and reply, respectively. Any supplementary material must be submitted within 10 days of this order's service date.

By the Commission, Division 3, Acting as an Appellate Division, Commissioners Brown, Clapp, and Christian.

APPENDIX I

Labor protective conditions proposed by RLEA and BRAC in Finance Docket No. 28250

1. NYD and BEDT may not consolidate facilities, or coordinate activities (with the sole exception of the coordinated use of equipment employed to transport railcars over water) without first giving notice of such proposed consolidation(s) and/or

coordination(s) to all affected parties, including representatives of employees, and without first obtaining prior approval of this Commission for such proposed consolidation(s) and/or coordination(s).

2. (a) All employees affected by this order shall receive as a minimum the levels of protection afforded by the employee protective conditions imposed in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952), as augmented by the protective arrangement certified by the Secretary of Labor pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565). The costs of the employee protective conditions are to be borne by the NYD.

(b) Within 15 days after the effective date of this order, representatives of the NYD, BEDT, and the labor organizations which represent employees of NYD and/or BEDT shall meet for the purpose of arriving at specific employee protective provisions which shall provide levels of protection no less than those called for by Condition 2(a), hereof, and to eliminate, if possible, problems presented by any rearrangements or realignments of work forces necessitated by NYD's control of BEDT. No coordination of marine-float operations may take place until such agreements are negotiated; labor organizations may not unreasonably refuse to enter into such agreements.

(c) All agreements entered into pursuant to Condition 2(b), hereof, shall be submitted to this Commission for its approval, pursuant to section 5(2)(f) of the act. Unless informed otherwise by this Commission, parties may act pursuant to, and under such agreements, pending Commission approval thereof.

APPENDIX II

Labor protective conditions imposed by the Administrative Law Judge in Finance Docket No. 28250

All employees, whether or not represented by the various labor organizations named in this decision, are to receive protective conditions prescribed in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952), as codified in appendix II to the report of the Commission in *Southern Ry.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557, 588 (1962), and as augmented by the *Appendix C-1* conditions of the National Railroad Passenger Corporation Agreement certified by the Secretary of Labor on April 16, 1971, in accordance with section 405 of the Rail Passenger Service Act (45 U.S.C. 565), subject to the following modifications:

1. Section 1, Article I of *Appendix C-1* shall be deleted.
2. Section 1, Article I and Section 1, Article II of the *New Orleans* conditions shall be modified so as to provide a 6-year protective period in lieu of a 4-year protective period.
3. Section 4, Article I of *Appendix C-1* shall be deleted. The notice and negotiation provisions of the Washington Agreement, as incorporated in the *New Orleans* conditions, shall apply.
4. Section 11, Article I of *Appendix C-1* and Section 6, Article I of the *New Orleans* conditions shall be deleted. In lieu thereof, the following arbitration provisions shall apply:

In the event any dispute arises with respect to the protection afforded by these conditions or with respect to their interpretation, application or enforcement, which cannot be settled by the carriers and the employee or his authorized representatives within 30 days after the dispute arises, it may be referred by either party to an arbitration committee for consideration and determination. Upon notice in writing served by one party on the other of intent by that party to refer the dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the arbitration committee and the two members thus chosen shall select a third member who shall serve as chairman. Should the two members be unable to agree upon the appointment of the third member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a third, or neutral, member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate the third member, which designation when made will be binding upon the parties. The decision of the majority of the arbitration committee shall be final, binding, and conclusive. The salaries and expenses of the third member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the Railroad's burden to prove the factors other than a transaction affected the employee.

5. In Article IV of *Appendix C-1*, references to "the Secretary of Labor" and "his designated representative" shall be deleted, and in lieu thereof the words "Interstate Commerce Commission" shall be substituted.

6. If at any time agreements are negotiated for employee protection, they shall, within 30 days of execution, be submitted to the Commission for appraisal.

APPENDIX III

Labor protective conditions to be imposed in certain railroad transactions handled under section 5(2) of the Interstate Commerce Act

ARTICLE I

1. *Definitions.*—

(a) "Transaction" means a transaction involving a common carrier by railroad subject to part I of the Interstate Commerce Act which requires Commission approval under section 5(2)(a)(i) of the act.

(b) "Displaced employee" means an employee of railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of or railroad who, as a result of a transaction is deprived of employment with railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom; provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of a railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions, and all collective bargaining and other rights, privileges, and benefits (including continuation of pension rights and benefits) of railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that there shall be no duplication or pyramiding of benefits to any employees, and, provided further, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits.

4. When railroad contemplates a transaction, it shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be effected by such transaction, including an estimate of the number of employees of each class affected by the intended changes.

At the request of either railroad or representatives of such interested employees, a place shall be selected within five (5) days from the date of notice to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for thirty (30) days. Each transaction which will result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of the thirty (30) day period there is a failure to agree, the negotiations shall terminate and either party to the dispute may submit it for adjustment in accordance with the following procedures:

(a) Within five (5) days from the termination of negotiations, the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee, then the National Mediation Board shall immediately appoint a referee.

(b) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(c) The decision of the referee shall be final, binding, and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(d) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

At the completion the ninety (90) day notice period, railroad may proceed with the transaction.

5. *Displacement allowances.*—

(a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules, and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period); provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carriers a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.,

6. *Dismissal allowances.*—

(a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and railroad shall agree upon a procedure by which railroad shall be currently informed of the earnings of such employee in employment other than with railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, or failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon employment rights of other employees under a working agreement.

7. *Separation allowance*.—A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

8. *Fringe benefits*.—No employee of railroad who is affected by a transaction shall be deprived during his protective period of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, relief, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of railroad, in active service or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law of corporate action or through future authorization which may be obtained.

9. *Moving expenses*.—Any employee retained in the service of railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not to exceed 3 working days, the exact extent of the responsibility of railroad during the time necessary for such transfer and for a reasonable time hereafter and the ways and means of transportation to be agreed upon in advance by railroad and the affected employee of his representatives; provided, however, that changes in place of residence which are not a result of the transaction, which are made subsequent to the initial change or which grow out of the normal exercise of seniority rights, shall not be considered to be within the purview of this section; provided further, that the railroad shall, to the same extent provided above, assume the expenses, et cetera, for any employee furloughed within three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provisions of this section unless such claim is presented to railroad within 90 days after the date on which the expenses were incurred.

10. Should railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. *Arbitration of disputes*.—

(a) In the event railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by railroad, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. *Losses from home removal.—*

(a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective period as a result of the transaction and is therefore required to move his place residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by railroad for any loss suffered in the sale of his home for less than its fair value. In each case, the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. Railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are made subsequent to the initial changes caused by the transaction and which grow out of the normal exercise of seniority rights, shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, the loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employees, or their representatives, and railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner:—One to be selected by the representatives of the employees and one by railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when terminated or furloughed, even though in a different craft or class, on railroad which he is, or by training or retraining physically and mentally can become, qualified, not however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or retraining is requested by such employee, railroad shall provide for such training or retraining at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under sections 1 or 2 of this article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Subject to this appendix, as if employees of railroad, shall be employees, if affected by a transaction, of separately incorported terminal companies which are owned (in whole or in part) or used by railroad and employees of any other enterprise within the definition of common carrier by railroad in section 1(3) of part I of the Interstate Commerce Act, as amended, in which railroad has an interest, to which railroad provides facilities, or with which railroad contracts for use of facilities, or the facilities of which railroad otherwise uses; except that the provisions of this appendix shall be suspended with respect to each such employee until and unless he applies for employment with each owning carrier and each using carrier; provided that said carriers shall establish one convenient central location for each terminal or other enterprise for receipt of one such application which will be effective as to all said carriers and railroad shall notify such employees of this requirement and of the location for receipt of the application. Such employees shall not be entitled to any of the benefits of this appendix in the case of failure, without good cause, to accept comparable employment, which does not require a change in place of residence, under the same conditions as apply to other employees under this appendix, with any carrier for which application for employment has been made in accordance with this section.

ARTICLE IV

Employees of railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations' under these terms and conditions.

In the event any dispute or controversy arises between railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the disupte to arbitration.

ARTICLE V

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established pursuant to section 5(2)(f) of the Interstate Commerce Act. In so doing, changes in wording and organization from arrangements earlier developed under section 5(2)(f) have been necessary to make such benefits applicable to mergers, consolidations, unification or coordination projects, or acquisition of assets involving common carriers by railroad subject to part I of the Interstate Commerce Act. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act and pursuant to section 405 of the Rail Passenger Service Act.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.

FINANCE DOCKET NO. 26764

GULF, MOBILE AND OHIO RAILROAD COMPANY ABANDONMENT BETWEEN DWIGHT, LIVINGSTON COUNTY & WASHINGTON, TAZEWELL COUNTY, ILL.

Public convenience and necessity found not shown to permit abandonment by applicant of 79.6 miles of the rail line known as the Dwight branch in Livingston, LaSalle, Marshall, and Woodford Counties, Ill. Application denied.[1]

John W. Adams, Jr., and *Harry R. Begley* for applicant.

Richard Leiken, Gordon P. MacDougall, George P. Sheahan, John McGraw, T. J. Dugan, James Clack, Dick E. Carlisle, Toby Thomas, and *Robert Fritz* for protestants.

DECISION AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Review Board Number 5, held at its office in Washington, D.C., on the 26th day of March 1973.

Upon consideration of the application and record in the above-enitled proceeding, including (a) the report and recommended order of the Administrative Law Judge, served November 3, 1972, which would, among other things, deny the proposed abandonment without prejudice to the carrier's filing a petition to reopening the proceeding for further hearing, or filing of a new application, 2 or more years after the effective date of this Commission's entry of its order herein, which new filing would enable this Commission to determine whether during such test period (1) the carrier had taken all available measures to eliminate or drastically reduce its branch operating deficits, and (2) shippers and receivers of freight had utilized it to its fullest extent, and whether such operation of the branch line would constitute a burden upon applicant or on interstate commerce, (b) the exceptions of applicant to said report and recommended order and petition for reopening for further oral hearing, filed December 4, 1972, (c) the joint exceptions of protestants, village of Metamora and Thomas J. Duggan, and petition to dismiss the application, also filed December 4, 1972, (d) protestants' reply to applicant's exceptions, filed December 26, 1972, and (e) applicant's reply to protestants' exceptions and petition to dismiss application, filed December 29, 1972; and

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[1] Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D.C., and served on all other parties in interest, within 30 days from the date of service shown above. Replies thereto may be filed within 20 days after the final date for filing exceptions.

It appearing, That no good cause has been shown for further oral hearing or dismissing the application; that the findings and conclusions of the Administrative Law Judge, except as herein modified are, in all material respects, proper and correct; that the exceptions raise no new or material matters of fact or law not adequately considered and properly disposed of by the Administrative Law Judge in his report; and that the said exceptions and replies otherwise, are not of such nature as to require the issuance by Review Board No. 5, of a report discussing the evidence in the light of such pleadings;

Wherefore, and good cause appearing therefor:

We find, that the evidence considered in the light of the exceptions, and the replies thereto, does not warrant a result different from that recommended by the Administrative Law Judge except to the extent set forth hereinafter, and that the statement of facts, the conclusions, and findings of the Administrative Law Judge, being otherwise proper and correct in all material respects, except as modified below, should be, and they are hereby, affirmed and adopted as our own; and

It is ordered, That applicant's petition seeking reopening for further oral argument, and protestants' petition to dismiss the application be, and they are hereby, denied; and

It is further ordered, That the recommended order of the Administrative Law Judge, served November 3, 1972, denying the proposed abandonment between Dwight, Livingston County, and Washington, Tazewell County, Ill., be, and it is hereby, adopted as the order of the Commission, Review Board No. 5, effective 20 days from the date of service hereof; *provided, however,* that in view of the time elapsed since the date of service of the Administrative Law Judge's report the 2-year test period prescribed by the Administrative Law Judge before which applicant may file a petition to reopen the proceeding, or file a new application, should be, and it is hereby, reduced to 1 year from the date of service of this decision and order; and that such new filing shall contain in addition to the evidence concerning measures taken to eliminate deficits referred to in (1) above, evidence of the effect on the operation of the branch as an integral part of the system of the Illinois Gulf Central

Railroad Company, cf., *Department of Public Service Regulation, Public Service Commission, State of Montana* v. *United States*, et al. (No. 2084, U.S.D.C.—D. Mont.), decided June 26, 1972.

NOTE: This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

The statement of facts, conclusions, and finding of Administrative Law Judge John Roger Corcoran, follows:

By application filed August 12, 1971, Gulf, Mobile and Ohio Railroad Company, hereinafter sometimes referred to as GM&O or applicant, a common carrier by railroad, subject to part I of the Interstate Commerce Act, seeks a certificate of public convenience and necessity under section 1(18) of the act permitting the abandonment of its branch line of railroad known as the Dwight Branch, approximately 79.6 miles in length, beginning at milepost 75.424 near Dwight, Livingston County, Ill., and extending in a westerly direction through the counties of Livingston, LaSalle, and Marshall, to milepost 128.31 at Lacon in Marshall County, and from milepost 118 at Varna in Marshall County, southwardly through Woodford County, to milepost 143.837 in Washington, Tazewell County all in Illinois.

Notice of the proposed abandonment was posted and served as required under the act and the Commission's regulations. The proceeding was referred to the Administrative Law Judge for hearing and the recommendation of an appropriate order thereon. Hearing was held at Metamora, Ill., on April 5 and 6, 1972. The village of Metamora and the United Transportation Union oppose the granting of the application. Briefs were filed by the applicant and jointly by the protestants.

The branch is predominantly constructed with 80-pound rail, with a small amount of 90-pound rail. During the past decade the untreated ties originally installed have been replaced by second-hand treated ties which have an average extended service life of 8 years and tie plates have been added where required. The ballast is composed primarily of cinders and gravel. There are 39 bridges and 42 public and private grade crossing on the line.

The line is suitable for the safe operation of the light-density freight traffic moving over it at a maximum speed of 30 mph with a 220,000-carload limit and is not in a state of deferred maintenance.

The stations located on the line together with their locations, populations, alternative rail service available, and highway distance to other rail stations is as follows:

Station	Milepost	Population	Other railroad	Other railroad highway distance
				Miles
Dwight	74		GM&O	
Nevada	80.6	Rural	None	6.1
Blackstone	88	75	None	3.9
Streator[1]	96	15,606	AT&SF, BN, PC and N&W[2]	
Munster	90.3	Rural	None	4.5
Garfield	103.5	20	None	4.8
Wenona	109	1,080	IC[3]	
Evans	112	Rural	None	4.2
Varna	118	417	None	3.8
LaRose	122.3	165	AT&SF	
Washburn	127.6	1,173	None	3.7
Cazenovia	132.7	120	None	10.6
Low Point	131	250	None	7.5
Metamora[1]	137	2,176	None	6.1
Washington[1]	144	6,790	AT&SF and TP&W	
Lacon[1]	128.31	2,147	None	3.1

[1] Agency stations

[2] Atchison, Topeka and Santa Fe Railway Company, Burlington Northern, Inc., Penn Central Transportation Company, and Norfolk and Western Railway Company.

[3] Illinois Central Railroad Company.

Traffic involved.—The branch runs through a predominantly rural area where the bulk of the commodities handled are agricultural related. However, a number of other items, principally building materials are also handled. These commodities together with a tabulation of the number of cars of each that were handled during 1969, 1970, and 1971 moving between points on the branch as well as over the branch are set out in appendix A. These consisted of 471 cars in 1969, 822 in 1970, and 581 in 1971.

Present service on the branch consists of one train from Dwight to Washington three times a week and one in the opposite direction the same number of times. While there is no regularly assigned service between Varna and Lacon, traffic originating or destined to the latter point is handled by the Dwight-Washington train. There is no passenger service on the branch.

Applicant proposes to abandon the line because it has suffered continuing deficits in its operation and it feels that continued operation will only lead to increased maintenance expenses with no prospect of increasing the volume of traffic moving on the line to the extent necessary to operate profitably. Applicant's general balance sheet, as of June 30, 1971, shows total assets in excess of $290 million, including current assets of approximately $51 million, special funds of approximately $2 million, investments of $8.8 million, total properties less depreciation and amortization of more than $223 million, and other assets and deferred charges of almost $2 million. Its current liabilities were approximately $21 million; long-term debt was approximately $105 million; reserves accounted for approximately $2.9 million; other liabilities and deferred credits were more than $2.9 million. Applicant's retained income, appropriated and unappropriated, was $71 million. For the 6-month period ended June 30, 1971, its net railway operating revenues were in excess of $12.7 million and its net income was $3.5 million.

Protestants object to any failure to consider off-branch revenues accruing to other railroads comprising the carriers' system and more particularly the Illinois Central Railroad Company (Illinois Central). In December 1971 the Commission in *Illinois Cent. Gulf R.—Acquisition—G.,M. & O., et. al.*, 338 I.C.C. 805, approved the merger of the Illinois Central and the applicant here. However, this merger had been temporarily enjoined by the district courts in Missouri pending judicial review at the time of the hearing in the instant proceeding and accordingly the evidence adduced related to the applicant's posture at that time. Subsequently on August 9, 1972, the statutory reviewing court dismissed the complaint that had been filed and dissolved the temporary restraining order. The merger was consummated the following day and the Supreme Court denied an application for a stay of judgment. In these circumstances it would appear to be proper to consider relevant evidence relating to the Illinois Central in this proceeding. However, the protestants are the parties advocating the consideration of such evidence for the purpose of enhancing their position and in view of the conclusions reached here it does not appear that the public interest would be served or the expeditious handling of the instant proceeding aided by reopening the record to receive further evidence as to Illinois Central off-branch revenues at this time.

Appendix B hereto shows the financial results of operations on the line for the years 1969, 1970, and 1971, based on revenues and expenses and appendix C is a further breakdown of certain labor and material expenses.

The protestants object to certain of these figures. Initially, they point out that the mileage pro-rate applied to the revenues was determined on a system basis rather than on the actual distance cars moving over the branch involved moved beyond that branch. While this is true and figures based on the actual movements of cars rather than on a system comparison would be more accurate, these were not presented and evidence of the type that was presented has been accepted by the Commission in the past. Protestants argue that labor savings on the maintenance of way and structures as well as on health and welfare have not been substantiated and should not properly be considered. This would result in the exclusion of the following amounts claimed in this category for the 3 years indicated: 1969—$54,489, 1970—$55,818, and 1971—$69,341. The applicant presented witnesses whose background and familiarity with the branch and its requirements allowed them to adequately demonstrate the general accuracy of these figures sufficiently for their consideration here.

The protestants also point out that certain terminal work done at one of the termini of the route to be abandoned here was erroneously included in the computation of train crew wages which would amount to $3,329 for the year 1970. While it was the intent of those preparing the financial data referred to exclude payments made for this type of activity not actually conducted on the branch, the evidence does establish that such work is not actually reported separately from that performed on the branch and accordingly these expenses will not be considered. Protestants argue that the wages of the four station agents on the branch cannot properly be considered as they will be retained and are guaranteed an annual income under their agreement with applicant. While the maintenance of four full-time station agents in addition to the agent at Dwight on a branch which generates only traffic of the magnitude discussed previously could lead to speculation as to why all had been retained on the branch, the evidence does indicate that these particular agents could be utilized elsewhere at a saving to the applicant for those they replaced. Moreover, while references are made to guaranteed income and job protection, no evidence of the levels of these guarantees of protection in relation to present salaries have been introduced from which any legitimate deduction could be made for the figures submitted to reflect the present cost of maintaining these station agents. Accordingly these figures will be accepted.

Protestants objection to the inclusion of tax accruals applicable to the accounts objected to previously is rendered moot by the conclusion that the base figures should be considered.

The salvage value of the bridge and rail steel as well as the used ties amounts to $345,649.

Environmental impact.—Although the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.)* had not been implemented fully when this application was filed, it is appropriate to make the following findings based on the record.

The proposed abandonment would have no effect on soil or water pollution and an insignificant effect on noise pollution if it were granted although the present right-of-way might be made more attractive. Any increase or decrease in air pollution in the relatively sparsely populated area involved would not appear to be significant if the line were abandoned and motor vehicle traffic increased. Likewise there does not appear to be any measurable adverse environmental effect whether or not the abandonment is authorized.

The president of the village of Metamora presented a resolution adopted by the village board opposing the abandonment sought because it feels the availability of rail service will attract business and allow the continued growth of the village as well as preclude the loss of its present industry with the concomitant adverse effects on the residents and taxpayers of the village. Since 1963, the area contiguous to the railroad tracks has been planned as industrial and appropriately zoned.

The Metamora Telephone Company feels that rail service should continue because the availability of rail service attracts industry and that public utilities such as railroads have certain duties to the public. It has used the rail service for the transportation of telephone poles in the past on the average of once every other year.

Faubel & Sons, Inc., has a plant located at Washington, Ill. During 1970 it utilized 58 large carload equivalents of cement of which 40 carloads were actually handled by the applicant. In 1971, it used 140 carload equivalents of this product, 73 of which actually came by rail. It prefers rail service because of the larger quantities that can be handled by a car and because it does not have to stop operations as it does to unload trucks. However, its suppliers have experienced difficulty in obtaining railcars.

In 1970, it used the equivalent of 270 carloads of gravel and 32 cars of lime and in 1971 the equivalent of 711 carloads of gravel and 82 cars of lime, but did not utilize rail service, primarily because a special rate is no longer maintained and the present rates, if utilized, would render this shipper noncompetitive. In addition, it was not able to obtain satisfactory cars in sufficient quantity to meet its needs. It could utilize twice-a-week service rather than the present three-times-a-week service depending on the demurrage arrangements. This shipper's gravel is presently received from Spring Bay which is about 15 miles from its plant but when rail was utilized it received this commodity from Chicago where it is cheaper. It receives its lime from Chenoa which is 30 miles away.

American Allied Railway Equipment Co. of Washington reconditions railroad parts for freight cars. It is located next to the Faubel cement plant and here seeks to have the three-block track to the Toledo, Peoria, and Western Railroad Company (TP&W) interchange which runs to its plant maintained if the abandonment here is authorized. It selected its present site in part because of the availability of rail transportation and it depends on railroad service for some of the items it repairs, particularly railcars and parts, although it has received very few in the past 3 years.

Mr. Banta operates grain facilities at Low Point, Cazenovia, Washington, and LaRose and utilizes rail service over the present branch at the first two points. Although he previously utilized the service to a much greater extent, he shipped 16 cars in 1968, 3 in 1969, 1 in 1970, and 2 in 1971. In addition, he is shipping a small amount of coal into these two stations by rail. He attributes the drop in rail usage in part to the inability to get dependable service on cars ordered. In addition he had to spend time repairing cars so they could handle grain. Generally, this shipper would prefer rail to motor transportation where possible. Presently most of the grain is moved by motor to river point some 23 miles away.

The Atlantic-Richfield Chemical Company (Arco) operates a plant near Metamora which was constructed for rail deliveries and generally receives fertilizer by rail from Iowa and Illinois points. Its production has been doubling for the past 3 years and in 1972, it plans to receive 4,000 tons of fertilizer which loads to about 80 tons per car. It has utilized some motor transportation but has difficulty obtaining trucks and unloading them at its facility. Moreover, it considers the condition of route 116 which must be used to be dangerous. Also the rail rate is cheaper and this shipper's competitive position would be adversely affected if it had to use motor transportation. Ninety percent of its inbound freight comes by rail and this amounted to 21 cars in 1971.

Vistron Corporation is a subsidiary of Standard Oil of Ohio which distributes fertilizer materials to farmers through its subsidiary Sohiogro Services. It has a retail fertilizer outlet at Blackstone, Ill., valued at approximately $153,000 which is on the branch involved here and is dependent on rail transportation for the receipt of materials. In fact, the available rail service was a prime factor in its location. During 1971 this plant received 1,700 tons from points as distant as Florida and Canada which produced a rail revenue of $24,563. By 1974 it anticipates that it will be receiving 3,000 tons.

This shipper feels that it will almost certainly close this plant with the loss of employment to its 2 full-time and 11 seasonal employees if rail service is abandoned because it does not consider transportation by motor economically feasible in view of the fact that it would add approximately $17,000 to the cost of shipping the amount it handled in 1971 and it feels that this would render it noncompetitive. It also finds that there is a shortage of adequate motor vehicle equipment capable of handling such commodities as anhydrous ammonia under pressure. Fertilizer could be moved by truck from Budd which is served by the Penn Central Railroad (PC) at added expense to this shipper if there was a bulk unloading facility at that point but there is no indication that such a facility would be built. For these reasons it strongly opposes the abandonment sought here.

Mr. Martin is engaged in the retail lumber business in Metamora, Ill., where he receives rail shipments and in Germantown Hills, which is stocked by private carriage from Metamora. He favors rail transportation and presently receives 50 to 60 percent of his merchandise in that manner. He generally routes his traffic which consists of lumber, roofing, and cement so as not to "short-haul" the applicant. If rail service were discontinued he would have to receive railcars at some other point. He feels that his tonnage is increasing over the 38 cars received in 1971 and the 27 cars received in 1970.

The Chemicals Division of the Quaker Oats Company manufactures furan chemicals including Alcohol which are derived from corn cobs at its Memphis, Tenn., plant. The cobs are gathered in relatively small local areas generally not exceeding 15 miles in radius and shipped by rail to Memphis. There are eight shipping points on the applicant's rail line, two of which are on the branch involved here—Evans and Munster. This shipper currently has a contract to obtain 8,000 tons annually from the former point and 3,000 tons from the latter point. It is uneconomical to move the cobs in this area a greater distance to other rail points and they must use lines serving Memphis in single-line service to receive the present corn cob rate. This cob traffic is comparatively new in this area because the shipper's past local sources are not available due to technological changes in harvesting operations. As other cob suppliers are furnishing all the cobs available in their areas, this shipper would lose its present supply from the area near the two points on the involved branch line of railroad. The loss of the 11,000 tons of cobs received from these points would reduce this shipper's output of furfuryl alcohol by 1,100,000 pounds with a concomitant loss of more than $217,000.

Mr. Charlett operates a corn cob business which supplies Quaker Oats at a point on the Illinois Central Railroad and at a point on the branch involved here at Minonk. He would have to discontinue his business operation at the latter point, which is the larger of the two, if the abandonment were allowed. At present he has a contract for 8,000 tons of cobs at this point. He operates 4 trucks that pick up the cobs from shellers at farm sites and finds that pickups beyond 15 miles are too expensive because he would require an extra truck and driver for each of the several shellers in the area to handle such movements. This shipper was aware of the possibility that the applicant would seek to abandon this line but was given the impression by a railroad employee that the line would probably be in the existence for at least 10 years when he initiated his business in 1970.

Mr. Flanigan of Streator, Ill., has operated a corn cob business at Munster, Ill. for 5 years. He has a contract with Quaker Oats for the furnishing of 3,000 tons of this commodity annually. In view of the low value of the commodity, he feels that if the rail service were discontinued, he would not be able to operate because the maximum haul from his supplier must be less than 15 miles in order for the business to be profitable under present conditions. He could conceivably load all or part of the tonnage called for by his contract at his operation in Lostant which is on the Illinois Central Railroad track but finds that this additional amount of cobs are not available in the Lostant area.

Metamora Woodworking Company is located in Metamora and receives some products by rail. During 1969 it received 10 carloads, in 1970, 20 carloads, and in 1971, 9 carloads. It anticipates that it would cost $3,000 more per year than the $8,500 a year it has paid in freight costs to the railroad if motor vehicles were used.

Metamora Implement Company is a retail farm equipment dealer which receives 4 to 5 carloads of combines from Missouri at its place of business each year. At present it is generally able to drive these combines to destinations and utilizes a local truck for movement of the parts. If the abandonment is authorized it will have to receive its combines at another rail point and move them to destination by motor common carrier. In addition to the extra expense involved, it feels that modern combines are getting so large that the only feasible manner of shipping them is by rail.

The Metamora Grain Company receives fertilizer and other commodities and ships some grain from its Metamora facility. It feels that the price of chemicals coming from various points in the United States and Canada would be increased if rail service were not available. While its present outbound grain shipments are generally moving to the gulf by water it feels that when movements are made to other destinations the grain might well move by rail more competitively. It received 13 carloads in 1970, a portion of which consisted of fertilizer shipments from Agrico Chemical Company. This shipper's only experience with truck shipments has been for small quantities from a river terminal where the transportation costs were higher.

Mr. Allen is a retail lumber dealer with yards in Princeton, Toluca, Lacon, Varna, and Wenona, Ill., and uses applicant's service at the last three. In addition, he receives service at Princeton from the Illinois Central Railroad. He feels that the Varna yard would be closed if the rail service is discontinued as it depends on the service for lumber and coal shipments.

The Metamora Businessmen's Association feels that rail service is important to potential industrial location in the area and the Low Point-Washborn-LaRose Businessmen's Club also opposes the abandonment.

The editor of Metamora Herald newspaper supports the continuation of rail service for the good of Metamora and Woodford County and because she owns property on the rail line where construction of a paper warehouse for the receipt of paper by rail is planned.

Members of the United Transportation Union employed by the applicant who have worked on the branch involved described the normal work during a day as including some switching and other work at the Dwight terminal which is reported on the same time sheet as the work on the branch involved here, and estimated that considering the yard time in Dwight and Washington and the wages of the crew, that approximately $4,200 of the amount attributed to the crew's wages by the applicant is not chargeable to work on the branch.

The representative of the Brotherhood of Railway, Airline, and Steamship Clerks which has labor jurisdiction over the four station agents who had been employed prior to 1962 had a guaranteed income even if they are laid off which is computed by reference to a base period in 1963 or 1964 and subsequent incremental increases. He further indicated that there were no present openings for agents and that the applicant here was seeking approval from the Illinois Commerce Commission for the closing of stations which would result in the elimination of eight agents in addition to the four involved here.

The representative of the Brotherhood of Locomotive Engineers feels that the abandonment of the branch involved would result in a chain reaction affecting some 53 engineers, and requests the imposition of the Burlington conditions if the application is granted.

DISCUSSION AND CONCLUSIONS

Applicant here seeks to abandon the involved branch primarily because of the comparatively small gross revenue derived from it, the little use of it by shippers, the losses attributable to its continued operation and the adequacy of rail and motor carrier service. Although applicant's overall financial condition is good, it feels that the continued operation of this branch would constitute a drain on its financial resources and be detrimental to its system operations. However, before an abandonment of a line may be authorized, it must be shown by the applicant that the losses to be sustained from the continued operation of the line are so large, when balanced against the extent of the traffic and the public need for the continued operation of the line, that the applicant may not justly be required to continue to bear the financial loss necessarily entailed by the operation. In balancing these respective interests, the effort is to decide "what fairness to all concerned demands." *Colorado* v. *United States*, 271 U.S. 153, 169.

Initially, it is apparent that the length of the line sought to be abandoned here is somewhat longer than those normally involved in proceedings of this nature. It traverses an area where a number of shippers, principally in the agricultural and building-materials business, depend on the service. The volume of business of a number of these concerns is increasing and a number directly depend on rail service to the extent that corn-cob-shipping operations, a fertilizer-mixing plant and lumber yards would be forced to cease doing business if they did not have available the type of service provided by the applicant. Rail service is necessary to these shippers either to remain competitive, to handle the types of commodities involved or to avoid the use of inadequate roads. Moreover, depending on the availability of equipment for the transportation of bulk commodities particularly and any changes in grain marketing patterns from the present export sales at the gulf, it appears that traffic moving over the branch could well advance significantly in the future as it has recently in the movement of corn cobs and fertilizer.

The branch is admittedly in good condition now and able to handle traffic moving at relatively high speeds. While the projected costs of maintaining it reflect significant costs attributable to upgrading the line to handle heavier cars, there is no evidence to indicate that there is now or will be any demand or need for such equipment in the foreseeable future.

While the fact that losses are being incurred is of significance in determining whether continued operation of this branch will result in an undue burden upon interstate commerce, the magnitude of the losses must be considered in relation to the need for the service and the effect of the losses upon a carrier's ability to continue an adequate and efficient transportation service. See *Missouri Pac. R. Co. Discontinuance of Passenger Trains*, 320 I.C.C. 1. Here, as noted, the ability of a number of shippers to do business would be seriously impaired because the cost of transportation by other means would be considerably higher so as to render them noncompetitive and would not be an adequate substitute for the branch. Moreover, there is no definite evidence that the applicant has explored ways in which to reduce operating expenses on the branch. It would appear that a reduction in the schedule, in the number of station agents and in any upgrading program would effectively reduce the cost of operating the branch.

Weighing all of the pertinent factors, and balancing the public need against the benefit to applicant, the Administrative Law Judge concludes that the branch should be retained at least for the foreseeable future because the applicant has failed to sustain its burden of showing that the branch could not be operated in a manner which would not be materially burdensome to it or interstate commerce. This conclusion is without prejudice to applicant's filing a petition to reopen this proceeding for further hearing or a new application, 2 or more years after the effective date of the order entered herein, which would enable the Commission to determine whether during such test period (1) applicant has taken all available measures to eliminate or drastically reduce its branch operating deficits, and (2) shippers and receivers of freight have utilized it to its fullest extent, and whether operation of the branch would constitute a burden on applicant or on interstate commerce.

The representatives of the railway labor organizations requested, with the concurrence of the applicant, that in the event the Commission should authorize the abandonment, the conditions prescribed for the protection of employees in *Chicago, B. & Q. Co. Abandonment*, 257 I.C.C. 700, should be imposed. In view of the conclusions reached here, it is unnecessary to consider this request.

ULTIMATE FINDINGS AND ORDER

Upon consideration of all the evidence of record, the Administrative Law Judge finds that applicant has failed to show that public convenience and necessity permit the proposed abandonment; and that application should be denied.

Premises considered, it is the ORDER of the Administrative Law Judge that in the absence of a stay or postponement by the Commission or the timely filing of exceptions, the effective date of this order shall be 30 days from the date of service hereof.

It is further ordered, That the application be, and it is hereby, denied.

APPENDIX A

Traffic moving over Dwight Branch listed by commodity, years 1969, 1970, and 1971

FREIGHT MOVED BETWEEN POINTS ON THE DWIGHT BRANCH AND POINTS BEYOND IT—YEARS 1969, 1970, AND 1971

	1969	1970	1971
Corn	5	2	2
Soybeans	19	14	0
Corncobs	58	428	217
Logs	5	0	0
Coal	25	23	13
Chrome ore	0	0	4
Flitches	4	0	0
Railway wheels	1	0	0
Tractors	5	8	11
Tractor attachments	1	6	0
Motor graders	2	0	2
Harvestors threshers combines	1	3	4
Agricultural implements	5	4	0
Lumber	32	21	28
Stone	19	8	0
Boxes	9	9	2
Ammonia phosphate	2	0	16
Anhydrous ammonia	23	19	12
Ammonia sulphate	0	1	0
Ammonia nitrate	0	7	2
Superphosphate	34	24	17
Fertilizer	11	21	21
Nitrogen fertilizer solution	0	0	6
Fertilizer-ammonia solution	5	0	0
Agricultural insecticide	1	0	0
Fertilizer phosphate solution	1	0	0
Phosphate rock	0	0	22
Potassium chloride	47	31	0
Muriate of potash	0	0	27

Traffic moving over Dwight Branch listed by commodity, years 1969, 1970, and 1971—Continued

FREIGHT MOVED BETWEEN POINTS ON THE DWIGHT BRANCH AND POINTS BEYOND IT—YEARS 1969, 1970, AND 1971—Continued

	1969	1970	1971
Sodium borate	0	1	0
Calcium chloride	8	5	0
Cullet	24	23	0
Firebrick	6	2	6
Hi temp mortar	2	0	0
Feldspar	0	0	1
Wooden poles	13	0	3
Poles, creosote or treated	0	8	0
Wooden piling	2	4	0
Piling, iron or steel	0	5	0
A&P feed	19	16	12
Plywood	2	1	1
Shingles	0	0	1
Roofing compound	4	0	0
Roofing	0	6	6
Cement	50	41	79
Gypsum lath	1	1	0
Calcined plaster	1	0	0
Gypsum wallboard	3	4	0
Wallboard	3	11	7
Boards—compressed	9	0	0
Sawdust board	0	5	0
Pulpboard	1	14	23
Wood excelsior	0	0	3
Packing fiberboard	1	0	0
Iron and steel products	7	0	0
Metal products, mix carload	0	5	0
Steel sheets	0	2	0
Steel bars	0	1	0
Steel pipe	0	2	0
Steel beams	0	2	0
Steel channels	0	1	0
Fabricated steel products	0	1	0
Machinery, dredging	0	2	0
Transformers	0	1	1
Coal-hauling vehicles	0	2	0
Sisal fiber	0	1	0
Scrap paper	0	1	0
Molten sulphur	0	0	2
Hardwood pallets	0	0	4
Chairs or stools	0	0	1
Wooden chairs	0	1	0
Sulfuric acid	0	8	15
Salt	0	0	4
Household goods	0	1	0
Freight all kinds	0	3	0
Railroad freight car on wheels	0	7	5

Traffic moving over Dwight Branch listed by commodity, years 1969, 1970, and 1971—Continued

FREIGHT MOVED BETWEEN POINTS ON THE DWIGHT BRANCH AND POINTS BEYOND IT—YEARS 1969, 1970, AND 1971—Continued

	1969	1970	1971
Airbrake equipment	0	0	1
Canned vegetables	0	1	0
Bottles	0	4	0
Totals	471	822	581
Local	72	16	17
Overhead	543	60	50
Grand totals	1,086	898	648

APPENDIX B

Revenues, expenses, and projected savings

	1969	1970	1971
Branch line:			
Revenue	$61,996.00	$39,356.00	$45,546.00
Operating expense	182,364.00	190,287.00	216,683.00
Loss	120,368.00	150,931.00	171,137.00
System (Revenue earned from branch line traffic):			
Revenue	98,682.00	101,987.00	80,821.00
Cost of transportation on 50-percent formula	49,341.00	50,994.00	40,410.00
Net revenue	49,341.00	50,993.00	40,411.00
Effect on system			
Branch line loss	120,368.00	150,931.00	171,138.00
System revenue	49,341.00	50,993.00	40,411.00
System savings on abandonment	71,027.00	99,938.00	130,727.00

APPENDIX C

Acct. No.	1969		1970		1971	
	Labor	Material	Labor	Material	Labor	Material
202	$12,651.33	----	$12,736.04	----	$13,411.79	----
208	462.07	----	126.89	----	7,020.06	2,461.19
212	----	421.63	----	73.03	----	1,405.47
214	----	(28.57)	----	(49.83)	----	1,397.42
216	178.70	1,967.70	225.89	902.21	----	5,954.76
218	----	----	----	----	----	----
220	26,345.69	----	28,019.04	----	40,641.54	----
221	3,210.80	310.42	1,624.17	402.70	823.79	402.01
228	301.11	----	246.53	71.24	259.74	6.38
247	----	----	58.03	----	----	----
249	2,356.62	1,242.53	2,453.52	1,188.31	2,476.28	2,058.66
269	1,105.54	55.32	514.25	807.32	101.32	406.56
270	290.17	----	----	----	----	----
271	431.62	1,046.64	529.32	837.23	27.25	926.11
272	2,633.27	27.18	2,766.19	35.92	964.78	27.50
273	2,176.27	328.74	3,861.04	73.40	----	1,761.18
Total	52,143.19	5,371.59	53,160.91	4,341.62	65,726.55	16,807.24
302	130.58	----	----	----	----	----
311	4,407.77	4,367.96	5,044.83	3,235.89	4,794.79	2,503.56
328	----	163.47	----	215.94	----	33.34
Total	4,538.35	4,531.43	5,044.83	3,451.83	4,794.79	2,536.90
373	38,411.41	----	32,054.38	----	36,992.83	----
376	145.08	1,754.30	----	2,009.79	----	2,621.46
379	116.07	----	----	----	----	7.09
392	11,906.43	----	12,494.39	----	12,944.69	----
394	----	2,337.25	----	2,357.41	----	2,176.39
398	----	135.19	----	122.89	----	107.13
400	2,636.48	48.96	3,170.98	40.56	2,294.74	50.04
401	19,364.04	----	19,293.57	----	20,976.01	----
402	----	1,583.47	228.40	2,399.49	----	1,924.27
404	----	28.79	----	29.90	----	110.18
405	----	----	540.19	----	----	----
410	----	35.76	----	138.21	----	96.53
415	87.06	----	----	----	147.87	----
Total	72,666.57	5,923.72	67,781.91	7,098.25	73,356.14	7,093.09
Grand total	129,348.11	15,826.74	125,598.65	14,891.70	143,877.48	26,437.23

Above figures do not include any joint facility, insurance, health and welfare, railroad tax accurals, hire of freight cars nor estimated expense of handling traffic beyond the branch. April 5, 1972.

DOCKET AB-26 (SUB-NO. 5)

THE GEORGIA NORTHERN RAILWAY COMPANY ABANDONMENT OF OPERATIONS BETWEEN ALBANY AND CORDELE, GEORGIA

Public convenience and necessity shown to permit abandonment of operations by The Georgia Northern Railway Company over its branch line of railroad between Cordele and Albany, Ga.; conditions prescribed, and certificate and order issued.

Charles N. Marshall and *David D. Green* for applicant.

Allison Wade, Whitfield R. Forrester, Gordon E. Ganka, J. Clifford Hawkins, Jr., and *George I. Winn* for protestants.

DECISION AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3 (Commissioners *Brown, MacFarland,* and *Clapp*), held at its office in Washington, D.C., on the 13th day of December 1976.

Upon consideration of the application and the record in the above-entitled proceeding, including the report and recommended order of the Administrative Law Judge, served August 6, 1976, the exceptions filed by the protestant, Crisp County Power Commission, and the reply of applicant thereto; and

It appearing, That the findings and conclusions of the Administrative Law Judge with respect to all matters of fact and law considered and disposed of in his report, except as herein modified, are in all material respects correct; that the exceptions of the protestant and the reply thereto otherwise raise no new or material issues of fact or law not adequately considered and properly disposed of by the Administrative Law Judge in his report; and that the said exceptions and replies are not of such nature as to require the issuance by division 3 of a report discussing the evidence in light of such pleadings;

It further appearing, That the Administrative Law Judge recommended approval of the instant application, subject to certain conditions designed to preserve service to the protestant herein; that among the bases for his recommendation certain opportunity costs were considered; that, though opportunity costs as interest costs do not qualify as savable costs and should not have been considered, see *New York, N.H. & H.R. Co.—Discontinuance of Service* 320 I.C.C. 544 at 555 (1964), the costs of rehabilitation do not need to be proven to a mathematical exactitude if the record supports a finding that such costs would be substantial, see *Transit Commission* v. *U.S.*, 284 U.S. 360 at 370 (1931); that the existent record shows substantial rehabilitation costs which are not likely to be amortized in any reasonable period in view of the declining revenues over the line; that, at page 10 of the report and recommended order, are listed certain conditions; that condition 2(a) should include the additional sentence placed at the end of the condition: "Appropriate tariffs must be filed:" and that, with these modifications, we find that the record supports the recommended abandonment, as conditioned, in all other respects;

Wherefore, and good cause appearing therefor:

We find, That the evidence considered in the light of the exceptions and replies thereto does not warrant a different result from that reached by the Administrative Law Judge, except as herein modified, and that the statement of facts, the conclusions and findings of the Administrative Law Judge, as modified, being proper and correct in all other material respects, should be, and they are hereby, affirmed and adopted as our own.

It is ordered, That the order of the Administrative Law Judge, served August 6, 1976, which would grant the applications, as herein modified, be, and it is hereby, adopted as the order of the Commission, Division 3, effective 35 days from the date of service hereof.

The statement of facts, conclusions, and finding of Administrative Law Judge Thomas I. Megan follows:

By application filed May 31, 1974, The Georgia Northern Railway Company, a common carrier by rail subject to part I of the Interstate Commerce Act, seeks a certificate of public convenience and necessity under section 1(18) thereof permitting the abandonment of operations over a branch line between milepost 1.60 near Albany, Ga., and milepost 34.66 at Cordele, Ga. Applicant also proposed to reclassify as an industrial lead the segment of track between milepost 32.6 at West Cordele and milepost 34.44 at Cordele, a distance of 1.84 miles.

By order of the Commission, the application was referred to this Administrative Law Judge for hearing and initial decision which, under the recently enacted Railroad Revitalization and Regulation Reform Act, must be submitted within 120 days after completion of evidentiary proceedings or, in this case, July 30, 1976. Public Law 94-210, section 303(b) amending section 17 of the Interstate Commerce Act.

A hearing was held at Cordele on April 1-2, 1976, at which 18 witnesses testified in opposition to the proposed abandonment. During the course of the hearing, the Administrative Law Judge viewed portions of the line in the presence of representatives of the parties. The Crisp County Power Commission (Power Commission), and the Georgia Public Service Commission oppose the application. Appearances were also entered for the United Transportation Union. Briefs have been filed.

On December 12, 1974, the Office of Proceedings issued a Threshold Assessment finding that the abandonment would not have a significant impact on the environment and that it was not necessary to prepare a detailed environmental impact statement under the National Environmental Policy Act. The Power Commission criticized the Threshold Assessment and particularly complained of the environmental disadvantages that a proposed coal transloading site within the city of Cordele might have. In reply, applicant proposed a coal transloading site in West Cordele outside the city limits and adjacent to the plant of Kaiser Agricultural Chemicals. On October 30, 1975, the Office of Proceedings affirmed its Threshold Assessment and found no significant environmental impact from the West Cordele transloader. The office recommended that a condition be imposed in the abandonment certificate to ensure that the Power Commission will have available to it an environmentally acceptable transloading site. Applicant has agreed to this condition, and it will be imposed as part of the abandonment certificate.

At the hearing no evidence was received contradicting the negative Threshold Assessment. The city manager of Cordele did object to any transloading sites within Cordele, but he specifically disclaimed any knowledge of the proposed West Cordele facility. It follows, and I so find, that the proposed abandonment is not a major Federal action significantly affecting the human environment.

APPLICANT AND ITS PROPOSAL

The line in question traverses about 33 miles of flat or gently rolling terrain in southwest Georgia between the cities of Albany and Cordele. Both Albany and Cordele will continue to be served by either applicant or other members of the Southern Railway System (Southern), of which applicant is a part. The line serves the nonagency stations of Balls Siding, Stocks, Beloit, Chehaw, Pippin Siding, Philema, Starr Farm, Oakfield, Warwick, Marshall, and Raines.

Until 1964, the line was owned by Albany & Northern Railroad Company (A&N), an independent short line. At that time the A&N was acquired by the Live Oak, Perry & Gulf Railroad Company, a subsidiary of Southern Railway Company and part of Southern. Subsequently, the A&N was merged into the applicant, another subsidiary of Southern. After Southern's acquisition of the A&N in 1964, inspection of the line revealed that a bridge over the Muckafoonee Creek near Albany was unsafe. The bridge was taken out of service and plans were made to serve all points on the line as needed from either end. However, there was no demand for service subsequent to that date between milepost 1.6 (at the Muckafoonee Creek near Albany) and milepost 21.52 (near Warwick). No evidence in this proceeding suggests any past (since 1964), present, or future demand for service over the part of the line between milepost 1.6 and milepost 21.52. The justification for abandonment of this segment is clear and need not be discussed further in this decision.

Protestants argue on brief that this discontinuance of service constituted an unlawful abandonment contrary to section 1(18) of the Interstate Commerce Act for which applicant should now be penalized. This is an erroneous contention and must be rejected out of hand. There is no obligation on the part of a carrier to run trains over a line regardless of demand. Here there simply has been no demand for service and the formal abandonment of operations over this segment will have no effect on any of the communities involved, including the city of Albany, none of which oppose the application. *McGrody* v. *Baltimore and Ohio Railroad*, 217 F. Supp. 252; and *Demopolis, Ala., Chamber of Commerce* v. *Southern Ry. Co.*, 206 I.C.C. 70.

The service involved in this proceeding concerns the end of the branch from Warwick at milepost 21.52 northeast to Cordele, a distance of about 10 miles. Here applicant has been providing its customers with train service two or three times a week, operating short trains with a small engine and a three-man crew based at Moultrie, Ga., 50 miles away. The proposal to reclassify 1.84 miles of track between West Cordele and Cordele to an industrial lead flows from the fact that another of Southern's subsidiaries, the Georgia Southern & Florida (G. S. & F.), also serves Cordele and will be able to handle the traffic on this stub with its crews if reclassification is permitted. No one opposes this portion of the application. In this connection applicant has agreed to furnish continued rail service to a transloader facility if erected at West Cordele by the Power Commission to facilitate the handling of coal shipments by truck to the Power Commission's steam plant located on a spur near Warwick.

The following table displays the extent of the traffic handled on the line during the years 1974 and 1975.

Principal commodities	1974		1975	
	Cars	Tons	Cars	Tons
Farm products	54	4,645	40	3,526
Coal	353	25,085	159	10,613
Nonmetallic minerals, except fuels	2	86	1	55
Chemicals and allied products	2	201	----------	----------
Stone, clay, and glass products	22	1,100	8	434
Machinery, except electrical	5	70	----------	----------
Totals, carload freight	438	31,187	208	14,628

As seen, the principle commodity handled was coal with farm products accounting for most of the other traffic. Revenues attributable to the line between Warwick and West Cordele amounted to $48,685 in 1974 and $25,206 in 1975 while avoidable costs, including use of the 50-percent formula for determining the cost of moving traffic beyond the line, amounted to $37,341 in 1974 and $36,484 in 1975. These costs are termed avoidable because they cease upon cessation of operations. To these costs, applicant added an opportunity cost representing the cost to Southern of the capital necessary for rehabilitation of the line. Applicant's proof included evidence that the cost of rehabilitation between Warwick and West Cordele (10.32 miles) would be $749,903. If, as asserted, these funds were used on other and profitable enterprises, Southern would benefit to the extent it need not obtain the capital necessary for this extraordinary rehabilitation. Such cost was stated to be 10 percent by applicant but only 6.5 percent by an expert witness for the Power Commission, the divergence of views resulting from a comparison of equipment trust and bond financing at 8 percent plus the higher risk associated with an investment improving a branch line, versus a return on net investment in transportation property during the period 1972-1975 which was 6.5 percent for Southern according to protestant's witness. In either event, the addition of an opportunity cost places the line in a loss position in each of the 2 years.

According to applicant's testimony, the following table represents the financial results of operating the Warwick-West Cordele segment for the years shown:

West Cordele to Warwick

	Year 1974	Year 1975
Revenue	$48,685	$25,206
Costs	37,341	36,484
Revenue (shortage)	11,344	(11,278)
Opportunity cost	74,990	74,990
Net (loss)	(63,646)	(86,268)

However, the foregoing does not reflect the beneficial effect the operation had on other Southern system lines. Such effect is shown below:

West Cordele to Warwick

	Year 1974	Year 1975
Net (loss)	$(63,646)	$(86,268)
Additional system revenue	64,869	44,993
Additional system cost (computed using 50-percent formula)	32,435	22,497
Net (loss)	(31,212)	(63,772)

Although protestants mounted an attack on applicant's most figures, the evidence on the whole sustains their validity. Protestants failure to provide for certain wage costs and the calculation of transportation expenses through allocations rather than available actual figures accounts for such of the difference between applicant's presentation and that of protestants. The legitimacy of applicant's figures is enhanced by the fact that no charge was made for fuel nor crew wages except overtime.

REHABILITATION

Applicant has spent very little money on this line in recent years, seeking to keep maintenance expense at the absolute minimum and commensurate with the ability to handle light traffic at reduced speeds. There is no doubt that the line needs rehabilitation. The question is, how much? Applicant's proof included evidence of a need to replace three bridges at a cost of approximately $250,000, relaying 10.32 miles of track with 90-pound rail at a cost of another $1/4 million, which with track and surfacing work on the line, brings the total cost of rehabilitation to $749,903. The details are set forth in appendix A hereto. Protestants, on the other hand, consider it necessary only to do the track and surfacing work now. They would postpone bridge replacement for 8 or 10 years and rail replacement until additional traffic on the line required a majór relay. They consider an expenditure of $250,000 sufficient to accomplish all the rehabilitation required at this time.

The line was constructed between 1881 and 1891 with 60-pound rail which is now surface bent. Ties are in poor condition and there is little or no ballast. Drainage is bad because of the absence of ditching and the growth of heavy brush. Derailments occur about every fifth day of operation over the line in spite of a 5 mph speed limit.

If the work required by appendix A were performed at a cost of about $750,000, train speeds over the line could be increased to 25 mph. After such rehabilitation had been accomplished, maintenance expenses of $22,760 per year would necessarily be incurred to prevent the line from deteriorating. The record also reveals that a speed of 10 mph could be obtained for 5 years with the expenditure of $450,000 exclusive of work on the bridges. However, applicant did not advocate this lesser sum (about $50,000 less through reduction in tie replacements and the extent of the rail relay) because of the economy of track maintenance and the need to move the traffic. Thus, such relatively minor overall reduction in rehabilitation costs would cause a substantial increase in maintenance-of-way expense from $22,760 to $27,000 per year.

I am persuaded that it is necessary to expend the $750,000 for rehabilitation as contended for by applicant. Without in any way detracting from the high quality of the expert testimony produced by protestants' witness on this subject, I am convinced that applicant's engineers are justified in their views which resulted in the compilation of the figures found in appendix A. These witnesses are intimately familiar with the track structure and bridges on the line and their testimony concerning such matters as the advanced stage of decay of the bridges and the need for rail relay is found to be reasonable and commensurate with what was visible to the Administrative Law Judge at the time of his visit to the line. Correspondingly the testimony disputing these conclusions must be weighed in the light that it was based on a relatively cursory visual inspection of the track and bridges. In addition, protestants' witness agreed that a rail relay would be necessary with the advent of heavier cars. On balance, I accept as correct and reasonable applicant's estimate of rehabilitation costs.

PROTESTANTS

In the last few years there have been four principal users of the line: Williams Farm Service (Williams), near Raines; Stripling Fertilizer & Farm Supply near Warwick; Middlebrooks Milling Company (Middlebrooks), at Warwick; and Power Commission, near Warwick.

Of these, Williams received two cars of potash in 1974 and no cars during 1975. This company, which did not appear at the hearing in opposition to the abandonment, is now unloading potash and fertilizer from applicant's team track at Cordele. It is 4.9 miles from Cordele to the Williams place of business near Raines while it is 3.3 miles from the team track at Raines to that place of business.

Stripling Fertilizer & Farm Supply, situated on a farm 2 miles from Warwick, received 12 cars of limestone in 1974 and no cars since then. It now receives limestone from Georgia origins by truck. At one time this company had a tank for nitrogen fertilizer on the rail line, but this was moved to the farm when the supplier was changed and since then the tank has been supplied by truck. Grain from the farm is trucked to the Middlebrooks elevator at Warwick, to the Arabi elevator on the G.S. & F. 10 miles away, or to distant destinations through grain brokers.

Middlebrooks at Warwick shipped 57 cars of soybeans and corn and received 11 cars of limestone in 1974, and shipped 42 cars of soybeans and corn and received 8 cars of limestone in 1975. If the line is abandoned it will cost this shipper between $100,000 and $125,000 to relocate its facilities. Middlebrooks has been considering expanding these facilities at a cost of between $40,000 and $75,000. This would triple the number of cars shipped if the railroad increased service to twice a week. Expansion plans were shelved when abandonment of the line became a possibility.

The Power Commission is by far the greatest user of the line. A tabulation of the number of carloads of coal it received each year 1970 to 1975 follows:

	Cars	*Tons*
1970	311	20,700
1971	299	15,400
1972	254	17,050
1973	84	5,725
1974	353	25,085
1975	159	10,613

The plant was shut down for 2 months when the lake above the dam was lowered to permit removal of tree stumps in 1973.

Coal is used to fire the steam-generating plant situated at the end of the Power Commission's spur on the Cedar River 2 miles from Warwick. Propane gas and natural gas are also burned. Electricity is generated from this plant only when demands for power exceed the sum of the following three sources of more efficient and less costly power: (1) hydroelectric power from the four hydroelectric generators at the adjacent power dam which was constructed in 1930 at a cost of $1,250,000; (2) purchased power from the South Eastern Power Administration; and (3) purchased power from the Georgia Power Company.

Service is provided the city of Cordele, the county of Crisp and a few customers outside the county. The steam plant was built some 15 years after the hydro plant at a cost of $2,250,000. The Power Commission is practicially debt free having recently paid off the last of the bonds issued to finance the construction of the steam plant. Power is provided the Power Commission's customers at rates approximately 20 percent below the rates of other suppliers of electricity in the area.

The price of coal delivered at the plant fluctuates from year to year. In 1974 the price was $34.29 per ton, in 1975 it was $30.63 per ton. Trucking coal from West Cordele to the plant, a distance of 14 miles, would add $2.20 per ton to the price. If the plant is shut down, the price of purchased power will go up because of loss of the ability to exchange peak-load power. However, the large investment in the plant would require continued operation even if the rail line were abandoned.

Applicant has made two proposals to the Power Commission concerning continued rail service, both of which have been rejected. In the first proposal, applicant would allow the Power Commission to reclaim the cost of construction of a truck transloading facility at West Cordele at the rate of $25 per car for 10 years or until the cost of construction, estimated at $40,000, is recovered. The second involved a proposed contract under which the line would be rehabilitated by applicant, then estimated to be at a cost of $715,563, with the Power Commission reimbursing applicant for such expense at the rate of $106,640 per year for 10 years, plus a charge, calculated at $5.25 per ton, on coal delivered at the plant to overcome applicant's deficits in operating the line.

Plans for constructing a transloader in West Cordele adjacent to the Kaiser Agricultural Chemicals plant were reviewed by the Commission's environmental staff and approved October 30, 1975. The staff recommended a condition in any abandonment certificate to guarantee the availability of such a transloader and applicant has accepted such a condition.

Numerous local witnesses from Cordele testified as to their expectations that the area traversed by this line will develop industrially in course of time and that abandonment will forestall such activity. Applicant countered, however, by showing that the line was acquired 13 years ago for the purpose of industrial development which has not materialized. Nor does the evidence of record show any more than a hope that railroad traffic will increase in the future. In fact the evidence points to a continuing decrease in future rail traffic. Eleven motor common carriers serve Raines and 14 serve Warwick.

DISCUSSION AND CONLUSIONS

The Supreme Court in *Colorado* v. *United States*, 271 U.S. 153, has set down the guidelines for decision in railroad abandonment cases under section 1(18) of the Interstate Commerce Act. There Mr. Justice Brandeis, speaking for the Court, stated at page 168:

> The sole test prescribed is that abandonment be consistent with public necessity and convenience. *** The benefit to one [interstate v. intrastate commerce] must be weighed against the inconvenience and loss to which the other will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce. *** The result of this weighing—the judgment of the Commission—is expressed by its order granting or denying the certificate.

In the weighing process, the interests of local communities must be judged against the broader public interest in protecting interstate commerce from undue burdens. Having heard and weighed the evidence, observed the demeanor of the witnesses, viewed a portion of the line, and studied the excellent briefs submitted by the parties, I conclude that abandonment should be authorized. I reach this conclusion for the following reasons:

1. The line being operated at a loss. This is true although maintenance expenses have been held to a minimum and operations proceed under a 5-mph speed limitation. When opportunity costs are added to the expense column, substantial financial deficits are shown for both 1974 and 1975.

2. Both sides agree that the line must be rehabilitated if operations are to continue between Warwick and Cordele. Applicant pegs rehabilitation cost at $750,000 while

protestants admit to $250,000. The difference is in the bridges and the rail relay. The evidence of record convinces me that the bridges are in advanced stages of decay and must be attended to now. Similarly, I believe that economical and efficient train operations cannot be conducted over the line without changing out the rail. Failure to re-lay the rail will make inevitable a continuation of slow, derailment-plagued operation, unable to satisfiy the needs of customers and their demands for heavier loaded freight cars. Cf. *Missouri-Kansas-Texas R. Co. Abandonment, Okla.*, 338 I.C.C. 728; *Chesapeake & O. Ry. Co. Abandonment*, 331 I.C.C. 889; affirmed 298 F. Supp. 589; *Baltimore & O. R. R. Abandonment Fairmont Branch*, 342 I.C.C. 751.

3. Alternate service is available to present users of the line. Farmers in the Warwick area can move their grain by truck to elevators at adjacent rail stations, just as they do today. The elevator at Warwick can relocate on another rail line or truck the grain to such point. It is already receiving all fertilizer shipments by truck. Applicant has made reasonable proposals to the Power Commission which, if accepted, would provide for continued coal shipments into the steam plant, either through taking over the rail operation or by trucking from a transloader at West Cordele. Another alternative for the Power Commission would be the substitution of gas for coal at the generating plant. The effect of a slight increase in cost of firing the steam plant following adoption of an alternative to the present arrangement is tempered by the fact that customers of the Power Commission pay 20 percent less for power today than others supplied from competing power sources.

4. The future of the line is bleak. Traffic has been decreasing and could only be attracted to the line by improved service which means expensive rehabilitation. Opinions of local citizens as to forthcoming industrial expansion along the line must be viewed in the cold light of reality and the realization that no such development has occurred during the past 13 years. By applying for authority only to cease operations, applicant leaves open the possibility for resumption of rail service in the future should this become desirable. In addition, there is the offer of the applicant to turn the operation of the line over to the Power Commission, which, if accepted, would enable local interests to gain whatever benefit the continued presence of the railroad would bring to their programs.

5. That applicant is part of the Southern Railway System, an immensely successful and profitable enterprise for many years, does not alter the result. While the overall prosperity of a carrier may weigh the scale against abandonment in close cases, the circumstances in this case clearly favor abandonment for the reasons already related. Cf. *Southern R. Co.* v. *North Carolina*, 376 U.S. 93.

In this state of the record the conclusion is inescapable that it is wasteful of applicant's resources for it to continue to operate this line of railroad and that public convenience and necessity require its abandonment in order that interstate commerce may be relieved of the burden entailed in continued operation. The order authorizing the abandonment will contain conditions for the protection of employees.

ULTIMATE FINDINGS, CERTIFICATE, AND ORDER

Upon consideration of all of the evidence of record, the Administrative Law Judge finds that the present and future public convenience and necessity permit the abandonment of operations by The Georgia Northern Railway Company over that part of its line of railroad beginning at milepost 1.60 northeast of Albany, Ga., and milepost 34.44 at Cordele, Ga., as well as the reclassification of the line from milepost 32.6 at West Cordele to milepost 34.44 at Cordele as an industrial lead, subject to conditions hereinafter set forth.

The Administrative Law Judge further finds that this is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. 4332, *et seq.*

It is ordered, That in the event any person or government entity is considering an offer of financial assistance to enable the rail service involved to be continued, then such person or government entity should promptly given notice that it is considering such an offer by certified mail to carrier applicant and by first-class mail to all parties of record and the Commission;

It is further ordered, That applicant railroad shall, within 10 days after receiving notice that an offer of financial assistance is being considered, make available to the party considering the offer of financial assistance the information described under the heading "Railroads Seeking Abandonment Authority," which appears in the attached Notice of the Commission entitled "Procedures for Pending Abandonment Cases," served March 31, 1976, and published on that date in the Federal Register, 41 F.R. 13691 (hereinafter called the Procedures), and such information shall be made available in the manner described in the Procedures;

It is further ordered, That upon this order becoming administratively final, notice of the finding of public convenience and necessity made herein shall be published in the Federal Register pursuant to the requirements of section 1a(6)(a) of the Interstate Commerce Act, as amended;

It is further ordered, That, notwithstanding any notice that financial assistance is being considered that may have been given pursuant to the above ordering paragraph, any person or government entity desiring to offer financial assistance to enable the rail service involved to be continued shall, within 15 days of publication in the Federal Register of the above-described finding of public convenience and necessity, send notification of such offer by certified mail to applicant railroad and the Commission and by first-class mail to all parties of record, and such notification shall include the terms and information described under the heading, "Persons Offering Rail Service Assistance," which appears in the Procedures;

It is further ordered, That if the Commission finds that a financially responsible person has offered financial assistance in accordance with the Procedures, the Commission shall postpone the issuance of a certificate of abandonment for such reasonable time, not to exceed 6 months, as is necessary to enable such person or government entity to enter into a binding agreement with the applicant railroad to provide financial assistance for continued rail service or to purchase the rail line;

It is further ordered, That when the Commission is informed of the execution of any financial assistance agreement or acquisition and operating agreement, the issuance of the certificate of abandonment shall be postponed for such period of time as such an agreement (including any extensions of modifications) is in effect;

It is further ordered, That all correspondence to the Commission with respect to offers of financial assistance for the continued operations or acquisition of the subject line shall contain an appropriate reference to the subject proceeding; and that on the lower left-hand corner of envelopes containing such correspondence the following notation shall be typed in boldface "AB-RSCP";

It is further ordered, That subject to the conditions set forth herein, an appropriate certificate of abandonment shall be issued, and the applicant shall not effect any abandonment or discontinuance of service prior to the effective date of such certificate of abandonment;

It is further ordered, That the following conditions be observed:

1. Applicant shall protect its employees to the same extent as provided in *Chicago, B. & Q. R. R. Abandonment*, 257 I.C.C. 700 (1944).

2. (a) If, within 30 days after the effective date of the order permitting abandonment, the Power Commission advises applicant and the Interstate Commerce Commission in writing of the Power Commission's intention to construct a coal transloader in West Cordele, then applicant (directly or indirectly through an affiliate) shall provide rail switching service to the transloader for 10 years or until there has been no good faith demand for rail switching service to the transloader for a period of 1 year, whichever shall occur sooner. In addition, applicant shall permit the Power Commission to reclaim $25 per loaded coal car for 10 years or until the cost of constructing the transloader is recovered, whichever is sooner.

(b) Or, if within 30 days after the effective date of the order, applicant and the Commission are advised in writing of the Power Commission's intention to enter into a binding contract providing for rehabilitiation of the line between Warwick and West Cordele by applicant at a cost of approximately $750,000 with the Power Commission reimbursing applicant for such expense at a rate per year equal to one-tenth thereof for 10 years, plus a charge per ton on coal delivered to the Power Commission sufficient to overcome any deficit incurred by applicant in operating the line, then, in such event, applicant shall perform under such contract and shall not abandon operations between Warwick and West Cordele.

3. For a period of 6 months following the effective date of the order permitting abandonment, applicant shall offer to sell the track and right-of-way between West Cordele (milepost 32.6) and Warwick (milepost 21.52) to the Power Commission, or any other responsible person, firm, association, or corporation, for net salvage value, but applicant may reserve unlimited trackage rights over the line for use at any future time upon payment of a reasonable use-related charge.

It is further ordered, That when this certificate and order shall take place and be in force, the tariffs applicable to the line herein permitted to be abandoned may be canceled upon notice to this Commission and to the general public by not less than 1 day's filing and posting in a manner prescribed in section 6 of the Interstate Commerce Act;

It is further ordered, That when filing schedules canceling tariffs applicable to said line, the applicant shall in such schedules refer to this certificate and order by the date and docket number;

It is further ordered, That, if the authority herein granted is exercised, applicant shall submit for consideration and approval of this Commission two copies of the journal entries showing the retirement of the line from service and confirm, in writing, to this Commission, immediately after abandonment, the date on which same was effected;

It is further ordered, That, if the authority granted in this certificate and order is not exercised within 1 year from the effective date hereof, this certificate and order shall be of no further force and effect;

And it is ordered, That this order shall be effective 20 days from the date of service in the absence of an appeal or of a stay by the Commission.

APPENDIX A

Extraordinary rehabilitation required (cost per mile of track presently in service)

1.	Ties, new (700 at $12.40)	$8,680
2.	Ties, relay (700 at $2.50)	1,750
3.	Ballast (1,100 net tons at $1.95)	2,145
4.	Labor	4,955
5.	Other	4,176
6.	Total track and surfacing per mile	21,706
7.	Lay 90-pound rail (per mile)	
8.	Rail relay 90-pound (141.4286 gross tons at $55.00)	7,779
9.	Plates, relay (6,340 at $0.56)	3,550
10.	Spikes, new (12,680 at $0.1877)	2,380
11.	Joints, relay (294 at $2.26)	664
12.	Bolts, new (1,764 at $0.879)	1,551
13.	Rail anchors, new (3,170 at $0.61)	1,934
14.	Miscellaneous tools, equipment and supplies	3,000
15.	Labor	4,070
16.	Total rail laying cost per mile	24,928

A. Rehabilitation required between Cordele and West Cordele (1.84 miles)

17.	Track and surfacing, $21,706 x 1.84 miles	39,939
18.	Rail laying, $24,928 x 1.84 miles	45,867
19.	Ditching, $2,000 x 1.84 miles	3,680
20.	Total	89,486

B. Rehabilitation required between West Cordele and Warwick (10.32 miles)

21.	Track and surfacing, $21,706 x 10.32 miles	224,006
22.	Rail laying, $24,928 x 10.32 miles	257,257
23.	Ditching, $2,000 x 10.32 miles	20,640
24.	Replace bridge—milepost 23.4	130,500
25.	Replace bridge—milepost 29.2	30,000
26.	Replace bridge—milepost 29.5	87,500
27.	Total	749,903

REPORT AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Review Board Number 5 (Members *Krock*, *Pohost*, and *Taylor*), held at its office in Washington, D.C., on the 20th day of July 1977.

DOCKET NO. AB-43 (SUB-NO. 16)

ILLINOIS CENTRAL GULF RAILROAD COMPANY—ABANDONMENT—BETWEEN ELCO AND MURPHYSBORO, IN ALEXANDER, UNION, AND JACKSON COUNTIES, ILLINOIS

By application filed January 19, 1976, under section 1(18) of the Interstate Commerce Act, Illinois Central Gulf Railroad Company (ICG), a common carrier by railroad subject to part I of the act, seeks a certificate of public convenience and necessity permitting the abandonment of the line of railroad from milepost 518 near Elco, Ill., in a northerly direction to milepost 455 near Murphysboro, Ill., a distance of 36 miles, in Alexander, Union, and Jackson Counties, Ill. The application was a "short form" application, filed under subpart C of the Commission's abandonment regulations, 49 CFR 1121.30-35.

In a protest filed March 29, 1976, John W. McGinness of the United Transportation Union objected to the filing under the short form procedure and requested oral hearing. On April 2, 1976, ICG filed a motion to this protest. By order served June 16, 1976, Commissioner Brown granted the motion to strike insofar as it requested refiling of the application and oral hearing.

On July 1, 1970, McGinness filed a petition for reconsideration. On July 16, 1976, ICG filed a reply to the petition. By order served March 1, 1977, Division 3, Acting as an Appellate Division, found the protests which had been filed indicated that public opposition to the proposed abandonment may be significant. The division order set the proceeding for handling under the modified procedure and directed ICG to supply all of the information in its opening verified statement normally included in an abandonment application filed under subpart B of the Commission's abandonment regulations, 49 CFR 1121.20-24.

In its initial verified statement, ICG states that it has submitted therein the full information that would be included in applications under subpart B of the abandonment regulations or under subpart A, 49 CFR 1121.1-5. ICG's statement contains an argument of counsel followed by the verified statements of five ICG employees. Witness Hardlannert, in exhibit A to this statement, lists the freight traffic originated and terminated on the line for the years 1974, 1975, and 1976, which amounted to 3, 30, and 21 carloads, respectively. ICG states that, "any overhead traffic is irrelevant, since the line proposed to be abandoned is an intermediate segment, and both the portion north of milepost 554 and the portion south of milepost 518 will remain in service, and the overhead traffic can be handled other ways." The traffic figures provided show that the line generated fewer than two carloads per mile per year, and ICG claims the information provided satisfies the subpart B regulations.

ICG's other witnesses testified as follows: The current operation of the line produced losses of $40,639 in 1974, $33,371 in 1975, and $6,245 in 1976. There is an average of 1,200 totally deteriorated ties per mile, and total rehabilitation expense for the line is estimated to be $777,600. Normalized maintenance is estimated at $126,000 per year. The net average salvage value of the track materials is estimated to be $2,158,396. The total population at the seven stations on the line is about 2,300. The only shippers on the line are located in Jonesboro which has adequate alternate transportation by truck and is located only 1 mile from Anna, a point on ICG's main line. The above, when considered with the asserted lack of potential of the area for industrial development, is alleged to prove that the public convenience and necessity do not require the continued operation of the line.

PROTESTANTS

On May 16, 1977, the State of Illinois, the Illinois Commerce Commission, and John W. McGinness filed a joint verified statement in opposition to the proposed abandonment. The statement contains an argument of counsel and verified statements of the Honorable Paul Simon, United State Congressman, and Ben W. Norton, General Chairman of the United Transportation Union.

Protestants argue that the application should be denied for failure of proof. The subpart B regulations specify that an applicant shall submit a list of all freight carloads which moved over the abandonment trackage during the preceding 12 months. Protestant point out that ICG did not submit any information regarding "bridge" traffic which, in the case of a shipper at Elco, amounts to approximately 600 carloads per year. Through traffic moved over the line between Murphysboro and Cairo at least until June of 1974, and ICG and Chicago & Eastern Illinois Railroad Company interchanged traffic at Tamms until July 1, 1975. Thus, protestants argue that ICG has not established a prima facie case under the subpart B regulations so that the application must be denied.

Protestants also argue that ICG has failed to establish a prima facie case under subpart A of the regulations since ICG failed to show its "bridge" revenues and failed to apportion its revenues between on-branch and off-branch. On the cost side, ICG included all maintenance-of-way costs while excluding bridge revenue. Further, ICG computed its off-branch costs in accordance with the method established in Ex Parte No. 274 (Sub-No. 2) rather than the traditional 50-percent rule under subpart A of the regulations. The instant application was filed prior to the effective date of the regulations promulgated in Ex Parte No. 274 (Sub-No.2).

Protestants argue that since ICG proposes to reinstitute operations over the Cairo-Elco Line if the abandonment is authorized, the Commission should make findings regarding the economic viability of this alternate route. ICG should have submitted to pro forma statement of the expected financial results of operating over the alternate route. The cost of providing such alternate service is claimed to be an avoidable cost which ICG has not shown in its cost estimates.

Protestants request that the instant proceeding be consolidated with the proceedings in No. AB-43 (Sub-No. 27) and No. AB-11. The former proceeding covers the proposed abandonment by ICG of service between Seely and Mande. The latter proceeding deals with the Missouri Pacific Railroad Company's application to abandon its line serving Tamms. Protestants argue that the instant proceeding is closely enough related to require consolidation for decision.

Finally, protestants claim that the instant proceeding should be set for oral hearing. It is claimed that oral hearing is necessary to challenge the estimated cost of rehabilitation of the line and the claimed losses from operating the subject line.

APPLICANT'S REPLY

On June 6, 1977, ICG filed its reply statement. ICG argues that there is no significant public opposition to the proposed abandonment. Protestants have challenged the case made by ICG but have not presented evidence from shippers who use the line that there is a public need for the service.

ICG proceeds to reply to the specific challenges made by protestants. Without conceding the validity of protestants' argument that bridge traffic should be considered in this case, ICG restates its traffic evidence for 1976 to include such traffic. Including the traffic originating at or destined to Tamms and Elco, ICG carried 772 carloads over the line in 1976. This level of traffic results in an average of 21.4 cars per mile per year, so the 34-carload presumption would still be established.

ICG defends its presentation of revenues and costs associated with the line to be abandoned. Since ICG had excluded revenue from bridge traffic, it only included train expenses for those days when a train actually picked up or set out cars at points on the line to be abandoned. Again, without conceding the correctness of protestants' argument, ICG restates its 1976 revenues and costs to include the revenue from bridge traffic and the cost of all trains operated over the line.

ICG argues that use of Rail Form A off-branch costs as prescribed in Ex Parte No. 274 (Sub-No. 2) results in a much more accurate cost figure than the 50-percent rule. Further, use of the 50-percent rule is not required by the regulations so that its use herein is not mandatory.

Finally, ICG presents a pro forma cost study of the operations over the Cairo to Elco line. This study concludes that the avoidable loss from operations would be $1,392. ICG alleges that it has proven that the public convenience and necessity permit the proposed abandonment.

MOTION TO STRIKE

On June 15, 1977, protestants filed a motion to strike certain portions of ICG's reply statement. Protestants seek to have all of the exhibits attached to the reply statement of Hardlannert striken because these exhibits present new evidence, are not limited to a rebuttal of protestants' evidence, do not comply with the subpart A or B regulations since figures for only 1976 are presented, and the exhibits constitute material facts which are in dispute without affording protestants the opportunity of making a reply thereto.

On June 21, 1977, ICG filed a reply to the motion to strike. ICG argues that the exhibits in question were all prepared to answer specific issues and questions raised by the protestants in their verified statement. Further, protestants' arguments go more toward the credibitility to be given to the evidence tendered rather than to its admissability.

DISCUSSION AND CONCLUSIONS

Before proceeding to the merits of the case, we must decide (1) the motion to strike, (2) the request for consolidation, and (3) the request for oral hearing.

Protestants claim that exhibits A, B, C, and D to witness Hardlannert's reply statement contain new evidence which is not limited to rebuttal of protestants' evidence as required by rule 49 of the Commission's General Rules of Practice. The evidence presented in exhibits A, B, and C are restatements for 1976 of traffic, cost, and revenue figures so as to include the bridge traffic carried over the line. Exhibit D is the pro forma statement of the revenue and expenses of handling traffic to Elco and Tamms via Cairo.

Since Elco and Tamms will still be served via the alternate Cairo route after abandonment, ICG concluded that the bridge traffic generated by these two points was not relevant herein. We agree with applicant as to the relevancy of bridge traffic to the ultmiate decision, since the use by a carrier of an alternate route for bridge traffic is a matter of managerial discretion, *Missouri Pac. R. Co. Abandonment*, 324 I.C.C. 357, 366, and continued operation of a line should not be required merely because of bridge traffic that can be handled as expeditiously over another route, *Gainesville Midland R. Co. Abandonment*, 267 I.C.C. 256, 262. We do not agree, however, that the information need not be submitted in this proceeding. The regulations under subpart B clearly require a listing of all traffic carried over the abandonment trackage for the preceding 12 months. Even though the traffic could have been carried over another route, it was carried over the involved line and should have been included.

This particular bridge traffic data has two functions in this proceeding. On the one hand, it can be used to formally complete a subpart B application. Its second function is that of substantive evidence to be given whatever weight deemed appropriate. The primary purpose of an administrative proceeding is to reach a fair and just decision. In that light, we note that we have before us a subpart C application and, in addition, although it was submitted grudgingly, we have the information required to transform that original application into a subpart B application. For this decisional body to reject the information necessary to make the application whole would serve no just purposes, especially when the information bears no great weight in our decision. Thus, the motion to strike is denied with respect to exhibit A. Exhibits B and C stand in a different light. They involve the revenue and cost of the bridge traffic in exhibit A, but unlike the traffic data, this information is not required by the regulations for a subpart B application. Since it was not included in the applicant's opening verified statement and its absence was pointed out by protestants' verified statements, it may not be offered now as part of applicant's rebuttal testimony. Thus, the motion to strike is granted with respect to exhibits B and C.

Since applicant initially raised the issue of handling Tamms and Elco traffic via Cairo, and protestants questioned the viability of such an operation, exhibit D is properly admissible to rebut that challenge. Thus, the motion to strike is denied with respect to exhibit D.

We do not believe that the issues presented herein are closely enough related to those presented in docket Nos. AB-43 (Sub-No. 27) or AB-11 to justify further delay herein through consolidation for decision. The request of protestants for consolidation should be denied.

Finally, the statements submitted by the parties have developed a record which is quite sufficient for decision of the instant proceeding. We believe oral hearing to be unnecessary, and protestants' request, therefore, should be denied.

The evidence of record indicates that the line to be abandoned handled an average of less than two carloads per mile annually in 1974, 1975, and 1976. This is far below the 34-car average which raises a presumption that the public convenience and necessity does not require maintenance and/or continued operation of the line in question, 49 CFR 1121.23. Even if consideration is given to the bridge traffic of 1976, the most recent 12 months, the average is only 21.4 cars per mile per year, which still permits the presumption to be made. Once that presumption was established, the burden of going forward with the evidence shifted to protestants.

In their verified statement, protestants concentrated on attacking the evidence submitted by ICG. However, the statement of Congressman Simon includes letters from the Board of County Commissioners of Union County (Board), the Jonesboro Community Consolidated Schools (Schools), and Illinois Minerals Co. None of these letters were verified nor were they in response to the order directing modified procedure. Further, Schools and the Board were made parties to this proceeding but failed to file verified statement in opposition. Finally, the evidence in these letters are of questionable value even if considered. The Board states that Union County farmers could ship by rail and that the abandonment would reduce the possibility of any industry locating in the area. School states that Koppers, Inc., has a mill near the track and could utilize rail transportation as could the area farmers if ICG sought them out to provide service. Illinois Minerals Co. states that the alternate service to their Elco mill by way of Cairo is satisfactory to them.

Protestants have not submitted testimony from a single shipper served by the track to be abandoned which states that there is a need for the rail service or that such shipper would be hurt by the abandonment. While shipper testimony is not mandatory to rebut the presumption raised at hearing, the remaining testimony falls far short of being sufficient evidence of public need to rebut the presumption raised herein. Since the presumption raised has not been rebutted, there is no need to require ICG to continue operation of this line.

Considering further that in 1974, 1975, and 1976, the branch itself would not have generated sufficient revenue to operate at a profit, we are even more convinced that ICG should be permitted to abandon the subject line.

An environmental threshold assessment survey has been prepared by this Commission and made available for public inspection upon request. The survey has found that no significant impact on the environment would result from approval of the application. By notice served July 29, 1976, it was determined that, based on the aforesaid threshold assessment survey, no environmental impact statement need be issued in this proceeding as it does not represent a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. 433, *et seq*. Comments on said determination were received by the Commission. The comments were responded to in an addendum dated November 30, 1976. By notice served December 7, 1976, the public was informed that the comments submitted had not caused the Commission to modify its previous determination. We have considered the threshold assessment survey as part of the record herein, and we find that the economic advantages to be gained from the abandonment permitted herein outweigh any adverse environmental factors.

The threshold assessment survey further notes that most of the right-of-way underlying the track to be abandoned lies within or adjacent to the Shawnee National Forest. Interest has been expressed in acquiring the right-of-way as an addition to the National Forest or alternatively, for use as a bike-way. Accordingly, our approval herein shall be appropriately conditioned.

We note also that, although section 802 of the Railroad Revitalization and Regulatory Reform Act of 1976, insofar as it applies to labor protective conditions, is not specifically applicable to this proceeding, it is an expression of the congressional desire that, in the future, employees adversely affected by railroad abandonments should receive the same degree of protection as established pursuant to section 5(2)(f) of the Interstate Commerce Act and section 405 of the Rail Passenger Service Act. In light of that, we believe that it would be appropriate, at this time, to impose the provisions of section 405 of the Rail Passenger Service Act as a supplement to the labor protective condition ordinarily imposed in abandonment cases. See the decision and order of division 3, dated November 16, 1976, in No. AB-26 (Sub-No. 9), *Southern Railway Company Abandonment of Operations Between Atlanta Junction, Ga., and Piedmont, Ala.*

We find that, subject to the condition that employees shall be entitled to the protection provided in *Chicago, B. & Q. R. Co. Abandonment*, 257 I.C.C. 700, and the applicable provisions of section 405 of the Rail Passenger Service Act (45 U.S.C. 565), the present and future public convenience and necessity permit the abandonment by the Illinois Central Gulf Railroad Company of the line of railroad extending from milepost 518 near Elco, Ill., to milepost 554 near Murphysboro, Ill.; *provided, however*, that the Illinois Central Railroad Company shall keep intact all of the right-of-way, and bridges and culverts on the right-of-way, for a period of 120 days following issuance of the certificate for the purpose of permitting any responsible person or public authority to offer to purchase all or a part of such right-of-right for public use.

It is ordered, That in the event any person or Government entity is considering an offer of financial assistance to enable the rail service involved to be continued, then such person or Government entity should promptly give notice that it is considering such an offer by certified mail to carrier applicant and by first class mail to all parties of record and the Commission;

It is further ordered, That applicant railroad shall, within 10 days after receiving notice that an offer of financial assistance is being considered, make available to the party considering the offer of financial assistance the information described under the heading "Railroads Seeking Abandonment Authority," which appears in the attached Notice of the Commission entitled "Procedures for Pending Abandonment Cases," served March 31, 1976, and published on that date in the Federal Register, 41 FR 13691, and such information shall be made available in the manner described therein;

It is further ordered, That if the authority granted in this order is not exercised within 1 year from the date the certificate of abandonment is issued it shall be of no further force and effect;

It is further ordered, That subject to the conditions set forth above, an appropriate certificate of abandonment shall be issued, and the applicant shall not effect any abandonment or discontinuance of service prior to the effective date of such certificate of abandonment;

It is further ordered, That this order shall be effective 20 days from the date of service.

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FINANCE DOCKET NO. 27770[1]

BURLINGTON NORTHERN INC.—CONTROL THROUGH ACQUISITION OF SECURITIES OF—GREEN BAY AND WESTERN RAILROAD COMPANY

Decided July 8, 1977

In F.D. No. 27770, acquisition by Burlington Northern Inc. of control of Green Bay and Western Railroad Company through purchase of securities, approved and authorized. Conditions prescribed.

In F.D. No. 28143 and related AB dockets, applications of Soo Line Railroad Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Chicago and North Western Transportation Company found not shown to be consistent with the public interest. Applications denied.

Byron D. Olsen, Richard M. Gleason, and *Frank S. Farrell* for applicant BN; and *Daniel J. Sweeney, Frederick N. Trowbridge,* and *Steven J. Kalish* for GBW.

Robert G. Gehrz, Louis T. Duerinck, Thomas H. Ploss, Ford W. Crouch, Raymond K. Merrill, Richard M. Freeman, and *Foster Mattson* for Soo Line, Milwaukee Road, and CNW.

Robert J. Taube for the Michigan Department of State Highways and Transportation; *Steven M. Schur* and *Glen L. Derge* for the Public Service Commission of Wisconsin; *James L. Smith* and *Gati Grundmanis* for the Wisconsin Department of Transportation; *John W. Giorgio* for Environmental Staff, Interstate Commerce Commission; and *Jonathan C. Rose, Mark M. Levin,* and *Janet R. Urban* for the U.S. Department of Justice.

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[1] This report also embraces F.D. No. 28143, Soo Line Railroad Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; and Chicago and North Western Transportation Company—Control—Green Bay and Western Railroad Company and Acquisition of Trackage Rights—by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company in the city of Green Bay, Wisconsin, and docket Nos. AB-57 (Sub-No. 3), AB-7 (Sub-No. 28), and AB-1 (Sub-No. 55), Soo Line Railroad Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; and Chicago and North Western Transportation Company—Abandonment Between—(A) Arcadia and Wsiconsin Rapids, in Trempealeau, Jackson, and Wood Counties, (B) Plover and Manawa, in Portage and Waupaca Counties, (C) New London and Seymour, in Outagamie County, and (D) Green Bay, Brown County, Wis.

Gordon P. MacDougall, Kenneth L. Crosson, Edward J. Hickey, Jr., William J. Hickey, Thomas A. Woodley, Michael S. Wolly, and *Max Sykalski* for various labor organizations.

Byron F. Andrews, Robert W. Barclay, Frank J. Dempsey, Jr., Joseph M. Drexler, Robert K. Jorgensen, Edward J. Kulig, Ryan D. Sheehy, William L. Slover, Harry Trowbridge, John Duncan Varda, and *Michael S. Varda* for interveners.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS BROWN, MACFARLAND, AND CHRISTIAN

BY DIVISION 3:

Background.—By prior order, served July 21, 1976, it was found that due and timely execution of our functions requires omission in these proceedings of an initial decision by the Administrative Law Judge, and that the public interest will be best served by considering them together in a single report.

Involved are altenative acquisition proposals, the object of which is the Green Bay and Western Railroad Company (GBW), a common carrier which has provided service since 1897 in the movement of freight over a line of railroad extending from Winona, Minn., across mid-Wisconsin to Green Bay and Kewaunee, Wis., a distance of approximately 250 miles. At the latter point it connects with the Chesapeake & Ohio Railway Company car ferry operating to and from Ludington, Mich., and with the Ann Arbor Railroad Company car ferry (now operated by ConRail) to and from Frankfort, Mich.

In 1975, GBW's total operating revenue was $9,845,929, of which nearly half ($4,851,175) was derived from traffic moving on the ferries. Over the years its operations have been consistently profitable; and in 1975 its net income was $250,973.

The present routes of applicant Burlington Northern Inc. (BN) reach only limited portions of Wisconsin; i.e., an area around Superior in the extreme northwest, and points on its mainline to Chicago, which extends southward from St. Paul, Minn., along the eastern bank of the Mississippi River through Savanna, Ill. Under the BN proposal, GBW would continue to operate as a separate entity but under the overall control of BN exercised through stock ownership.

For that purpose, BN made a general offer which, if accepted by all GBW security holders, would entail a total purchase price of $3,397,000. By application in F.D. No. 27770, filed October 23, 1974, BN seeks authority under section 5(2) of the Interstate

Commerce Act to acquire such control. The application was the subject of 18 days of oral hearing held at Washington, D.C., and Green Bay between January 12 and April 15, 1976. Briefs were filed by interested parties on or before June 4, 1976.

The proposal advanced by Soo Lines Railroad Company (Soo Line), Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee Road), and Chicago and North Western Transportation Company (CNW)—carriers which have long served numerous points in Wisconsin over a network of routes throughout the State[2]—contemplates dissolution of GBW as an operating entity and abandonment of approximately 60 percent of its rail line. Specifically, for an aggregate consideration of $4 million, each of the three carriers would purchase certain properties and portions of the line of GBW and they would jointly acquire all of its remaining transportation assets, properties, and franchises. Their offer is embodied in F.D. No. 28143, filed on March 16, 1976, and is conditioned upon approval of contemporaneously filed abandonment applications in docket Nos. AB-57, Sub-No. 3 (Soo Line), AB-7, Sub-No. 28 (Milwaukee Road), and AB-1, Sub-No. 55 (CNW). Those applications were also heard at Washington, D.C., and Green Bay and involved 12 days of hearing between September 13 and November 18, 1976. Briefs were filed on or before January 18, 1977.

Maps depicting the extent of applicant's present multi-State routes and their routes in Wisconsin as they intersect with the line of GBW are attached hereto as appendixes A and B, respectively; an analysis of their traffic study methodology, data, and diversion estimates derived therefrom is incorporated as appendix C; and the substance of the testimony of shippers and other public witnesses who appeared at the hearings is contained in appendix D.

An Environmental Threshold Assessment Survey (TAS) prepared by Commission staff was issued on February 12, 1976, in connection with the BN proposal, and that document was supplemented by another TAS, dated October 14, 1976, in which potential environmental impacts of the three lines proposal were evaluated. In both surveys the staff, after extensive analyses, concluded that neither of the proposals, if implemented, would significantly affect the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (NEPA), and that preparation of environmental impact statements was not required. Notices reflecting those conclusions were duly served and, with one exception,[3] no adverse comments in response thereto have been received. In these circumstances, and upon careful review of the records in these proceedings, we affirm the staff conclusions.

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[2] Of the total rail track mileage in Wisconsin as of January 1, 1975 (5,797 miles), CNW had 2,420 miles (42 percent), Milwaukee Road had 1,370 miles (24 percent), and Soo Line had 1,306 miles (23 percent). In contrast, BN operated over only 344 miles of track in that State.

APPLICANTS

GREEN BAY AND WESTERN RAILROAD COMPANY

General.—The line of GBW traverses a predominantly rural area in central Wisconsin. Its rolling stock consists of 16 locomotives and approximately 1,329 boxcars and 30 hopper and gondola type cars. As of November 1975, it had 405 employees, of which 358 were members of unions and the remainder (47) were supervisory or "exempt" personnel; i.e., employees not covered by a labor agreement.

Green Bay, Wisconsin Rapids, and Stevens Point are GBW's principal traffic-producing points, and nearly all of the industries therein are also served by other lines directly or through reciprocal switching.[4]

Five manufacturers of paper and paper products constitute the largest volume users of GBW's services and, of those, four have mills in Green Bay which are served directly or through reciprocal switching by GBW, CNW, and Milwaukee Road; and one, Consolidated Papers, Inc., the largest single user of GBW, has plants at Wisconsin Rapids (served directly by GBW, CNW, Milwaukee Road, and Soo Line, with GBW providing switching on behalf of all), at Stevens Point (served directly by GBW and Soo Line), and at Biron. Consolidated is the only rail user at Biron, and its mill is served exclusively by GBW.[5]

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[3] We have considered and find without merit the contention in Milwaukee Road's brief, filed June 1, 1976, that the earlier TAS did not meet the requirements of NEPA and that, in consequence, issuance of a formal environmental impact statement, and opportunity to comment thereon, is required in the BN proceeding.

[4] Reciprocal switching is described in ***Switching Charges and Absorption***, 339 I.C.C. 65, 70 (1971), as follows: "It has long been a common practice among the railroads to participate at commonly served terminal areas in what is called reciprocal switching. In practice this means that one line-haul carrier operating within the teminal area will act only as a switching carrier in placing cars at industries on its own trackage for loading or unloading, as an incident of the line-haul movement of those cars over another carrier whose trackage in that terminal area does not extend to the serviced industry. The carriers reciprocate in their roles as switching and line-haul carriers at this terminal in accordance with the flow of traffic to and from industries on their respective trackage. In theory the carriers mutually exchange their switching services in these terminal areas, with the effect of extending the lines of each carrier to the other's industries—even on traffic for which they may be directly competitive as line-haul carriers. The scope of these reciprocal switching services is, of course, defined in the carrier's respective tariffs, either by definition of a specific area of trackage, or by identification of the particular industries for which reciprocal switching is held out. Frequently, the switching charges made applicable by each carrier for reciprocal switching are constructed without regard to the actual cost of the service, on the theory that these mutually incurred costs balance out each other. In many instances the line-haul carrier absorbs the reciprocal switching charges, thus placing the off-line industries within a given terminal area on an identical rate basis with its own on-line industries in that terminal area."

During 1975 the relative mix of commodities carloaded by GBW was as follows: 72.6 percent paper, 6.9 percent food or kindred products, 2.1 percent grain products, and 18.4 percent miscellaneous. Car types used were: 91.4 percent boxcars, 2.8 percent reefers (refrigerated), 2.4 percent gondolas, and 3.4 percent miscellaneous.

Operations.—GBW operates one scheduled train 6 days a week in each direction between Green Bay and Winona, two scheduled trains each way daily (except Mondays) between Green Bay and Kewaunee, and one local freight train each way 6 days a week between Wisconsin Rapids and Stevens Point. Its roadbed and 90-pound tracks are maintained in excellent condition so as to assure a minimum operating speed of 40 miles per hour over the entire line.

Normal running times between Green Bay and Winona (with service stops at intermediate stations) are 6' 50" westbound and 10' 29" eastbound, and 1' 30" each way between Kewaunee and Green Bay. Car ferries arrive and depart Kewaunee during early morning hours; and GBW's connections are such that cars received from the ferries arrive at Green Bay in sufficient time for same-day movement on the westbound train which arrives at Winona before midnight. Similarly, ferry traffic moving on GBW's eastbound train which leaves Winona between 7 and 10 a.m. usually arrives in Green Bay in time for movement to Kewaunee and next-morning departure on the ferries.

Traffic.—GBW handled a total of 71,440 loaded cars in 1974, of which nearly all (93.3 percent, or 70,245 cars) moved in conjunction with other carriers in interline service. Specifically, 1,195 carloads (1.7 percent) involved movements solely on the line of GBW where it served both as the originating and terminating carrier ("local" movements); 30,067 carloads (42 percent) originated on GBW's line and were interchanged by it with connecting carriers for movement beyond; 23,255 carloads (32.6 percent) were received by GBW from connecting carriers for termination at points on its line; and 16,923 carloads (23.7 percent) had both an origin and termination at points beyond the line of GBW and were handled by it in "overhead" or "bridge" service.

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[5] Biron is located on a spur approximately 6 miles east of Wisconsin Rapids over the line of GBW but is not included within the tariff switching district of Wisconsin Rapids. Accordingly, on traffic which it originates or terminates at Biron and interlines with other carriers at Wisconsin Rapids, GBW receives a division of the applicable line-haul rate for the through movement rather than a relatively nominal switching charge.

The 71,440 cars carried 2,883,160 tons of freight and produced gross revenue of $10,191,210 for GBW in 1974. Those totals reflect moderate increases over GBW's experience in the prior 2 years. Thus, in 1972, it handled 63,858 cars carrying 2,598,830 tons for $7,693,987; and in 1973 it handled 70,389 cars carrying 2,852,034 tons for $8,830,789. In 1975, a recession year for railroads generally, GBW handled less cars (61,271), but its total tonnage and revenues increased, respectively, to 3,008,271 and $10,206,550, reflecting general rate increases and shipper efforts to achieve lower transportation costs through heavier loadings. As between the enumerated types of movements (i.e., local and interline originated/delivered/overhead), percentile relationships during 1975 remained basically the same as in 1974; and in 1975 traffic density on GBW ranged from a minimum of 43,118 carloads moving over any given segment of its line to a high of 76,189 moving on the segement between Wisconsin Rapids and Plover.

The following tables shows, by station, the approximate number of carloads which GBW originated or terminated on its line during 1974, including local movements.

TABLE 1

Station	Originated	Terminated	Total
Kewaunee	70	264	334
Green Bay	20,063	12,504	32,567
Seymour	273	352	625
Black Creek	40	3	43
Shiocton[1]	43	130	173
New London	6	26	32
Manawa	316	454	770
Amherst Junction[1]	5	49	54
Plover	655	722	1,377
Stevens Point	1,396	1,654	3,050
Wisconsin Rapids	5,443	6,736	[2]12,179
City Point[1]	20	0	20
Alma Center[1]	0	6	6
Hixton[1]	0	14	14
Taylor[1]	0	29	29

See footnotes at end of table.

TABLE 1—Continued

Station	Originated	Terminated	Total
Blair[1]	91	93	184
Whitehall[1]	81	115	196
Independence[1]	28	23	51
Arcadia	721	459	1,180
Winona	399	51	450
Total	29,650	23,684	53,334

[1] These stations are located on segments of GBW's line for which abandonment authority is sought under the counterproposal.

[2] About 40 percent of this 12,179 total (or 4,872 carloads) moved to or from the plant of Consolidated Paper Company at Biron.

GBW participated in approximately 84,947 interchanges during 1974.[6] Of the latter number, 53,305 took place at junctions on its line located west of Kewaunee as follows: 21,273 (40 percent) with BN, 12,708 (24 percent) with Soo Line, 9,739 (18 percent) with CNW, 8,647 (16 percent) with Milwaukee Road, and 938 (2 percent) with Ahnapee & Western Railway Co. (A&W);[7] and the remaining 31,642 interchanges occurred at Kewaunee and involved carloads moving cross-lake via the ferry services of Ann Arbor (18,619 cars) and C&O (13,023 cars). The table below provides additional details relative to the interchanges.

TABLE 2

Connecting line and junction	Carloads moved by GBW in interline service—1974		
	Received by GBW	Tendered by GBW	Total
BN at East Winona	10,918	10,355	21,273
Soo Line at:			
Black Creek	2,405	2,259	4,664
Plover[1]	4,354	2,703	7,057
Wisconsin Rapids	941	46	987
Subtotal	7,700	5,008	12,708

See footnote at end of table.

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[6] This total is 2,221 less than the 87,168 interchanges indicated by the number and type of GBW interline movements; i.e., 70,245 plus 16,923 cars moved in bridge service and interchanged twice. The difference is due to unreconciled variances in data supplied by GBW's traffic department, on the one hand, and its marketing department, on the other. The same infirmity affects other carload totals. While the variances are too slight to have significance on this record, their existence precludes exact correlations between carload totals.

[7] The 13-mile line of A&W connects with GBW at Casco Junction, Wis. It is owned by U.S. Plywood-Champion Paper Co. and is operated by GBW under a contractual arrangement.

TABLE 2—Continued

Connecting line and junction	Carloads moved by GBW in interline service—1974		
	Received by GBW	Tendered by GBW	Total
CNW at:			
Green Bay	2,369	1,720	4,089
New London	824	812	1,636
Wisconsin Rapids	976	19	995
Merrillan	578	340	918
Winona	1,301	800	2,101
Subtotal	6,048	3,691	9,739
Milwaukee Road at:			
Green Bay	1,258	1,253	2,511
Wisconsin Rapids	1,239	1,036	2,275
Winona	2,367	1,494	3,861
Subtotal	4,864	3,783	8,647
A&W at Casco Junction	404	534	938
Total interlines west of Kewaunee	29,934	23,371	53,305
AA at Kewaunee	5,004	13,615	18,619
C&O at Kewaunee	4,336	8,687	13,023
Total interlines—ferry	9,340	22,302	31,642
Total interlines	39,274	45,673	84,947

[1] Soo Line has trackage rights over the line of GBW between Stevens Points and Plover, its access to the latter point being solely for the purpose of interlining cars with GBW.

Of the cars interlined with BN at East Winona during 1974, approximately 41 percent were westbound cars which originated on the line of GBW, 30 percent were eastbound cars which GBW delivered at points on its line, and 29 percent were cars which GBW moved in overhead service from and to the dock at Kewaunee for cross-lake movement via the ferries. The latter total (about 8,169 cars[8]) accounts for nearly 20 percent of GBW's total ferry traffic in 1974.

During 1975, GBW's ferry traffic totaled 26,843 loaded cars, or 4,799 cars less than in 1974. Of the 26,843 cars, approximately 55 percent (14,978 cars) involved movements which originated or terminated at points on the line of GBW, prinicipally Green Bay

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[8] GBW's marketing department computed this total to be 6,505 cars, or 29 percent of the ferry traffic.

(11,831 cars);[9] 20 percent (5,450 cars) was interlined with BN at East Winona; 9 percent (2,581 cars) was interlined with Milwaukee Road (470 at Green Bay and 2,111 at Wisconsin Rapids and Winona); 7 percent (1,872 cars) was interlined with CNW (838 at Green Bay and 1,034 at New London, Merrillan, and Winona); 7 percent (1,868 cars) was interlined with Soo Line at Black Creek and Plover; and 2 percent (94 cars) was interlined with A&W at Casco Junction. Income-wise, cross-lake traffic handled in conjunction with Ann Arbor accounted for 28 percent of GBW's system revenue in 1975, or $2,754,052, and 21 percent, or $2,097,123, was derived from traffic moving via the ferry service C&O.

Ferry service.—Ann Arbor operates at least one (and often two) round trips daily, six times a week, between Frankfort, Mich., and Kewaunee; and C&O generally has provided one round trip daily between Ludington, Mich., and Kewaunee. Vessels on both lines are capable of accommodating 24 railcars per sailing. GBW performs switching operations at Kewaunee on behalf of Ann Arbor and C&O.

As indicated in table 2, nearly twice as many loaded cars moved eastbound on the ferries serving Kewaunee during 1974 than moved westbound. That ratio has prevailed for many years, with loaded cars moving eastbound occupying nearly all of the car-carrying capacity of the vessels and empty cars being used to fill otherwise excess capacity on movements in either direction.[10] The imbalance of traffic has contributed to the chronic financial crises which have long plagued the cross-lake ferry operations of Ann Arbor and C&O.

In October 1970, the C&O filed an application to abandon its ferry service to Kewaunee and, at the same time, Ann Arbor sought authority to abandon its ferry operations at Manitowoc. Both applications were denied by the Commission after extensive hearings.

In June 1972, Ann Arbor filed a new application to abandon its ferry services at Kenwaunee as well as at Manitowoc. However, in October 1973, Ann Arbor sought and was allowed to go into bankruptcy, thereby effectively mooting the abandonment application[11] and making it eligible for inclusion along with other bankrupt northeastern railroads in proceedings under the Regional

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[9] Wisconsin Rapids accounted for 841 cars; Biron, 827 cars; Stevens Point, 483 cars; and Plover, 139 cars.

[10] Movement of empty cars is performed at relatively nominal per diem charges.

[11] Ann Arbor's service at Manitowoc was terminated by embargo issued in 1973 when the vessel serving that port was declared out of service due to a major mechanical breakdown.

Rail Reorganization Act. But the United States Railway Association excluded most of the Ann Arbor, including its car ferry service, from ConRail in the Final System Plan. Since April 1, 1976, Ann Arbor has been operated by ConRail with funding being provided by the State of Michigan (Wisconsin also, as regards ferry service) under subsidies authorized by the Railroad Revitalization and Regulatory Reform Act of 1976. Under that act, however, the subsidies will expire at the end of a 2-year period.

Meanwhile, on March 18, 1975, C&O filed an application (in docket No. AB-18, Sub-No. 21) for authority to abandon all cross-lake operations, including service at Kewaunee. That application was the subject of a draft environmental impact statement served on October 13, 1976, but no further action has been taken as of this time.

Aware of the importance of cross-lake traffic to its economic well-being, and apprehensive about its ability to continue operations in the event of loss of one or both ferry services, GBW initiated in 1971 negotiations with BN which culminated on October 21, 1974, in unanimous approval by GBW's board of directors of the agreement underlying the instant BN application.

Financial data.—In 1974 GBW's operating revenues were $9.97 million, a record high; and its net income for that year was $322,498. In 1975 those amounts were $9.84 million and $250,973, respectively. Its income and expense statement for those years is set forth in the following table.

TABLE 3

	1975	1974
Railway operating revenues	$9,845,929.62	$9,972,359.76
Railway operating expenses:		
Maintenance of way and structures	2,155,372.24	2,059,540.58
Maintenance of equipment	1,745,483.81	1,466,620.08
Traffic	665,296.30	614,337.57
Transportation	3,542,861.40	3,468,620.43
General	882,668.96	740,069.35
Total operating expenses	8,991,682.71	8,349,188.01
Net operating revenues	854,246.91	1,623,171.75
Taxes	973,316.90	1,103,774.58
Railway operating income	(119,069.99)	519,397.17
Car-hire account[1]:		
Rent income	2,332,101.34	53,556.20
Rents payable	2,152,721.74	633,068.14
Net rents	179,379.60	(579,511.94)

See footnote at end of table.

TABLE 3—Continued

	1975	1974
Net railway operating income	$60,309.61	$(60,114.77)
Other income[1]	353,627.71	536,436.55
Total income	413,937.32	476,321.78
Miscellaneous deductions from income	138,856.22	128,958.96
Income available for fixed charges	275,081.10	347,362.82
Fixed charges	24,107.82	14,865.28
Net income	250,973.28	332,497.54

[1] The large disparity between 1974 and 1975 data reflected in the two indicated accounts is due to changes in accounting methods adopted by GBW in 1975. There were no significant substantive changes in either account.

GBW's balance sheet as of December 31, 1975, shows total assets of $20,686,935, including $3,992,551 in current assets and $16,144,649 representing depreciated value of its transportation related properties; and current liabilities are shown as $3,656,637 and total shareholders' equity as $16,817,837. The balance sheet follows:

TABLE 4

Assets

Current assets:		
Cash	$447,638.40	
Temporary cash investments	650,291.93	
Special deposits	127,265.00	
Traffic, car service and other balances, debit	116,561.65	
Net balances receivable from agents	441,336.73	
Miscellaneous accounts receivable	394,671.24	
Accrued accounts receivable	613,601.48	
Working fund advances	528.61	
Prepayments	25,979.31	
Material and supplies	1,170,848.80	
Other current assets	3,828.05	
Total current assets		$3,992,551.20
Special funds:		
Capital and other reserve funds	32,109.27	
Insurance and other funds	7,710.00	
Total special funds		39,819.27

Assets—Continued

Investments:		
Investments in affiliated companies	$170.00	
Total investments		$170.00
Properties:		
Road property	12,036,308.66	
Equipment property	5,380,863.41	
General expenditures	277,882.26	
Other elements of investment	3,312,610.85	
Construction work in progress	1,808.29	
Improvements on leased properties	7,947.00	
Total transportation property		21,017,420.47
Accrued depreciation—road	(2,121,094.87)	
Accrued depreciation—equipment	(2,751,676.68)	(4,872,771.55)
Total transportation property—less depreciation		16,144,648.92
Miscellaneous physical property	612,776.82	
Accrued depreciation—miscellaneous physical property	(274,649.71)	
Miscellaneous properties less recorded depreciation		338,127.11
Total properties less recorded depreciation		16,482,776.03
Other assests and deferred charges:		
Other assets	144,062.19	
Other deferred charges	27,556.38	
Total other assets and deferred charges		171,618.57
Total assets		20,686,935.07

Liabilities and shareholders' equity

Current liabilities:		
Traffic and car services balances—credit	1,515,620.55	
Audited accounts and wages payable	707,355.98	
Miscellaneous accounts payable	(15,647.07)	
Dividends matured upaid	16,197.50	
Accrued accounts payable	923,341.58	
Federal income taxes accrued	(38,624.86)	
Other taxes accrued	123,565.46	
Other current liabilities	424,828.06	
Total current liabilities		3,656,637.20
Long-term debt:		
Funded debt unmatured	129,944.25	
Total long-term debt		129,944.25

Liabilities and shareholders' equity—Continued

	Issued		
Other liabilities and deferred credits:			
Other liabilities		$76,641.43	
Accrued depreciation leased properties		5,875.03	
Total other liabilities and deferred credits			$82,516.46
Shareholders' equity:			
Capital stock	2,500,000.00		
Debenture "A"	600,000.00		
Debenture "B"	7,000,000.00		
Total capital stock			10,100,000.00
Capital surplus:			
Other capital surplus		348,348.37	
Total capital surplus			348,348.37
Retained income:			
Retained income appropriated		7,583,825.73	
Treasury stock		(1,214,336.94)	
Total retained income			6,369,488.79
Total shareholders' equity			16,817,837.16
Total liabilities and shareholders' equity			20,686,935.07

Securities.—GBW's securities consist of 25,000 shares of common stock having a par value of $100 per share, 600 class A debentures having a face value of $1,000 each, and 7,000 class B debentures also having a face value of $1,000.[12] Of those, 18,000 shares of stock, 3 class A debentures, and 6,376 class B debentures remain outstanding, the balance having been acquired over the years by GBW as Treasury Stock.[13]

Approximately 10,800 shares (or about 60 percent) of GBW's outstanding common stock are owned by its officers and employees, with officers holding about half, and ownership of the remaining 5,400 shares being dispersed among 86 employees. GBW's five-member board of directors collectively own 5,264 shares of stock and 1,000 class B debentures. The only officer of GBW serving on its board of directors is its president for the past 14 years, H. Weldon McGee; and he owns 3,650 shares of stock and 40 class B debentures.

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[12] No voting rights attach to class B debentures, and they are the most junior of GBW's securities from the standpoint of payment of dividends out of available annual net income. Also, holders are entitled to return of capital "only in the event of a sale or reorganization, and then only out of any net proceeds of such sale or reorganization which may remain after payment of any liens and charges ***" and after payment of face value to holders of common stock and class A debentures.

[13] GBW last purchased stock in 1973, acquiring 262 shares for $76 each and 72 shares for $79 each. In 1974, it bought 4 class A debentures for $1,000 each and 5 class B debentures for $180 each.

GBW has paid annual dividends on its common stock continuously since 1936; and during a 5-year period beginning on January 1, 1972, annual dividend payments were: $5 per share on common stock, $50 per unit on class A debentures, and annual amounts ranging from $2.50 to $20 per unit were paid on class B debentures.

On November 19, 1975, GBW's board of directors supplanted an existing company-funded pension policy for exempt employees by adopting a more comprehensive plan. Of the 47 GBW employees eligible to participate in the latter, about 15 will reach normal retirement age (65) and become eligible to receive full benefits by the end of 1979.

During 1976, GBW experienced a further decline in cross-lake traffic moving via the Ann Arbor ferry. Also, carload traffic handled in conjunction with the Ann Arbor is producing less revenue because of a progressive increase in the volume of lower-rated commodities being transported. GBW's president attributes both circumstances to a ConRail solicitation policy favoring its own long haul via Chicago over cross-lake routings involving Ann Arbor.

For the first 9 months of 1976, the total volume of traffic moved by GBW was 1,848,897 tons, down by 521,362 tons (nearly 22 percent) from a total of 2,370,259 tons handled during the corresponding period of 1975.

BURLINGTON NORTHERN

General.—BN was formed in 1970 by merger of three major midwestern and western railroads. See *Great Northern Pac.—Merger—Great Northern,* 331 I.C.C. 228. In addition to being one of the Nation's largest railroads, it owns vast tracts of timber, mineral, and land resources.

In 1975 it had net income of $52.9 million, down from $84.3 million in 1974. Its operating revenues during the past 5 years have ranged from a low of $1.1 billion in 1971 to a high of $1.6 billion in 1975. Its transportation division during those years has accounted for most of that revenue. In 1975, for example, that division produced operating revenues of $1.5 billion. At the end of 1975, BN had more than 46,000 employees, had cash and short-term investments of $73.9 million, working capital exceeding $97 million, and properties with a net value of $2.7 billion.

In 1975 BN's rolling stock consisted of 2,329 locomotives and 118,653 freight cars. It operates over approximately 23,000 miles of track extending from Chicago, Paducah, St. Louis, and Kansas City on the east, to Denver, Portland, Seattle, and Vancouver on the west, and to Winnipeg, Duluth, and Minneapolis/St. Paul on the north. Subsidiary lines of the BN, viz, The Colorado and Southern Railway Company and the Fort Worth and Denver Railway Company, extend south and east from Denver through Texas to the Gulf of Mexico at Galveston.

BN's sole point of connection with GBW is at East Winona, a point on its main transcontinental route between Chicago and the Pacific Northwest. That route serves major grain and low sulphur coal producing areas. The latter commodity is approaching the status of being the most important single revenue-producing commodity on BN.

Offer.—Pursuant to the Agreement of Sale entered into on October 21, 1974, the members of GBW's board of directors agreed to sell all of their personally held GBW securities to BN under the terms of its tender offer, and they adopted and sent to all other security holders a resolution recommending acceptance of that offer.

The offer was issued on October 22, 1974, with an expiration date of January 20, 1975, later extended to March 6, 1975. Therein, BN promised to pay GBW security holders $1,000 for each of the three outstanding class A debentures, $250 for each of the class B debentures, and $100 for each share of capital stock. Purchase of all outstanding securities of GBW at the indicated prices would entail a total expenditure by BN of $3,450,000, consiting of $3,397,000 for the securities and $53,000 for expenses incurred in making the offer.

GBW stock and class B debentures are traded in the over-the-counter market on a limited basis; and the prices offered by BN equal or exceed the highest prices bid on the market during the preceding 5-year period, according to a listing of inter-dealer quotations furnished by The National Quotations Bureau, Incorporated. During 1974, that listing shows $87 as the best market price for the stock and $200 as the high bid for class B debentures.

The offer provides that accepting holders transmit their securities to a depository bank in Green Bay; that dividend rights (and voting rights with respect to shares) are retained by the owners of securities so deposited until such time as the transaction is consummated; that consummation is contingent upon approval of BN control of GBW by this Commission; and that, absent such approval on or before October 22, 1976, owners may thereafter withdraw tendered securities.

Under the terms of its offer, BN expressly retains an option to withdraw: (1) if fewer than 80 percent of both GBW's outstanding stock and its class B debentures (or less than 14,400 shares and 5,101 class B debentures) are tendered as of March 6, 1975; (2) if Commission approval is qualified by conditions other than "normal labor protective conditions;" and (3) if, prior to consummation, any material adverse change shall have occurred in the financial or operating condition of GBW, other than changes resulting from general business conditions and the condition of the economy in general. As to the latter option, the offer states that "A cessation of the Lake Michigan car ferry service of the Ann Arbor Railroad Company shall not be considered as materially adversely affecting GBW or the purchaser, provided that car ferry service shall continue to be provided from Kewaunee, Wisconsin to the eastern shore of Lake Michigan by the Chesapeake and Ohio Railway Company."

In connection with the purchase, BN expresses willingness to be bound by "New Orleans conditions" for employee protection imposed in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952).[14]

Further, and with reference to exempt employees, BN agrees to assume and continue GBW's pension policy, including the comprehensive plan adopted on November 19, 1975; and it has agreed that no present exempt employee of GBW, prior to the time he attains the age of 65, will be deprived of his employment status or placed in a worse position with respect to compensation, benefits or privileges of employment as a result of the purchase.

Also, BN has no objection to approval herein being conditioned upon observance of "DT&I" traffic conditions imposed by the Commission in *Detroit, T. & I. R. Co. Control,* 275 I.C.C. 455, 492, to assure maintenance of existing routes and channels of trade. Those conditions, with appropriate editorial adaptations, are set forth in appendix E.

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[14] In general, the New Orleans conditions, as modified, provide (1) for 90 days' written notice prior to changes affecting the status of employees and for negotiations implementing agreements involving selection of employees of involved carriers; (2) for full monetary compensation for wage losses by employees who may be placed in a worse position during a period of 4 years from the effective date of Commission approval of a railroad coordination proposal, or the length of service of the employee, whichever is the lesser; (3) for fringe benefits, necessary expenses of moving, and for losses suffered through sale of homes at less than fair value; and, to cover situations where adverse effects on employees might not occur until a substantial time has elapsed after the date of an approval order; and (4) for modified benefits during a maximum period of 5 years extending from the effective date of a coordination.

Objectives.—BN views its interchange with GBW at East Winona as having been substantial and mutually beneficial.

Over the years that connection has enabled BN to become an effective participant in movements to and from industries in central Wisconsin on the line of GBW; and to assist in maintaining GBW's economic viability, thereby to assure continued access to those industries, BN has encouraged use of GBW as a "bridge" in connection with movement of transcontinental traffic via Lake Michigan car ferries.[15]

The Lake Michigan routing provides shippers with an alternative which avoids transit through congested rail yards in Chicago. However, BN's active solicitation of that route entails a sacrifice of some revenue since, as noted above, its longest haul is obtained by operating to and from Chicago through East Winona.

But with the future of cross-lake ferry service in doubt, BN fears that loss of even one of the two such services available at Kewaunee would so weaken GBW financially as to lead to abandonment or dismemberment of its line; and it pursues this application believing that it can more effectively contribute towards continuance of GBW's service under a control relationship.

Under BN control, GBW would be accorded a large measure of autonomy in operational matters. No significant diminution is foreseen in levels of employment and to the extent reductions are made, they will be accomplished by attrition. Similarly, and again assuming continuance of ferry service at Kewaunee, there will be no reduction in train schedules, service, or in levels of maintenance.

With respect to the car ferries, BN realizes that their limited capacities, now almost fully used, effectively established a ceiling on use of cross-lake routings in the movement of transcontinental traffic; and it sees no prospect for improvement in that situation. Nor does it intend to provide any financial assistance to upgrade or even to maintain the ferry services at Kewaunee. Instead, BN will seek to sustain those services indirectly through efforts to strengthen GBW. Among other things, considered below, those efforts will be directed toward increasing GBW's cross-lake traffic so as to achieve capacity loading of the ferries on both eastbound and westbound sailings. Also, it will strive to improve revenue load factors on the ferries by encouraging return of empty cars via Chicago. It recognizes, however, that the predominant flow of empties is in a direction (westbound) in which it has the least influence over routing practices, but it is confident that satisfactory arrangements with eastern lines can be effected with respect to return of BN and GBW cars.

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[15] As used here, the term "transcontinental traffic" means traffic which has both an origin and destination beyond the line of GBW.

With the incentive of a controlling financial interest, BN will attempt to strengthen GBW by increasing traffic and decreasing costs.

Traffic.—BN will use the resources of its extensive sales organization to promote routings via GBW. In that respect, its diversified 150,000-car fleet (eighth largest in the Nation) will be an effective sales solicitation tool[16] in combination with increased coordinations of train schedules and rates. Run-through trains and volume rates will be employed if circumstances warrant.

BN anticipates long-rang traffic increases resulting from use of its Industrial Development Department resources to locate new industries along the line of GBW. Also, it expects to benefit as industries in the area served by GBW turn to low sulphur western coal as a substitute source of energy for natural gas, oil, and high sulphur coal. At present, however, the only facility in mid-Wisconsin utilizing western coal is the plant of Consolidated Paper at Wisconsin Rapids; and BN has no plans for establishing facilities for accommodating bulk commodities at Kewaunee or at any other point on GBW's line.

BN makes no attempt on this record to quantify in terms of carload volume or dollars the total amount of additional traffic which would move via GBW following consolidation, believing that such forecast necessarily would be highly speculative; and any gains would be more than offset by loss of traffic resulting from discontinuance of either or both ferry connections at Kewaunee.

On the other hand, the portion of total traffic increases which might be due to diversions from other railroads is ascertainable on this record with a reasonable degree of precision. That potential is considered at length in appendix C; and, as concluded therein, the annual revenue value of all traffic susceptible of being diverted from other railroads through unified operations of BN and GBW is slightly less than $2 million.

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[16] In addition to permitting GBW to draw freely upon it for cars (including highly specialized types), BN will be liberal in according "family line" waivers of car service rules requiring prompt return of empty cars. Also, BN will allow its cars to be used on eastbound movements of traffic originating on the line of GBW.

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Savings.—As a family line, BN will make available to GBW an array of services and facilities. Here again a multitude of intangibles precludes any overall assessment of benefits to GBW in terms of total dollars to be saved. For example, the precise amount of savings resulting from inclusion in BN's volume purchases of GBW's requirements for items such as fule, tracks, and ties depends upon variable market conditions; and it is virtually impossible to trace benefits flowing to GBW as a result of free access to BN's technical staff on a wide range of matters, including safety, training, and procedures for protecting the environment.

In some areas, however, savings are approximately definable. These include:

> At present GBW has full-time sales representatives at New York City, Pittsburgh, Detroit, Minneapolis, Portland, and Seattle.[17] Their offices will be closed within 1 year following approval of control, and sales solicitations will be performed out of existing BN offices at those points. About $21,547 in office rentals and staff expenses (personnel reductions to be accomplished through attrition) would be saved on an annualized basis, and $239,174 over a 5-year period.
>
> Locomotive track overhauls would be performed at regular intervals in a BN facility at lower costs than are incurred by GBW under its practice of making "running repairs" on an as-needed basis. The probable annual saving to GBW is $9,960.[18]
>
> BN's mechanized "AAR type" billing system will provide a simpler and more accurate method of computing and processing expenses incurred by GBW in repairing foreign cars. GBW foremen now spend considerable time making calculations and entries manually. The result would be a yearly saving approaching $18,000.
>
> Use of BN's capability for designing signal systems and its ultrasonic track inspection cars would reduce GBW expenses by about $2,400 annually.
>
> BN's engineering staff includes an experienced steel bridge inspector. His services will replace outside consultants hired by GBW and thereby save at least $6,000 annually.
>
> Special roadway heavy maintenance equipment (including mechanized tie gang units, pile drivers, anchor applicators, and ballast sleds and plows) and BN expertise in use thereof will be made available, with resultant probable annual savings to GBW of about $10,000.
>
> Link-up with BN's computerized car tracing and inventory system (COMPASS) will improve car utilization on the GBW, resulting in savings of per diem payments in excess of $24,000 annually.

Acceptance.—Holders of 15,528 shares of GBW common stock and 2,671 class B debentures (representing 86 percent and 42 percent, respectively, of the outstanding issues) signified their acceptance of the BN offer by placing their securities with the named depository bank on or before March 6, 1975.

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[17] Prior to the close of hearings herein, GBW's principal sales agent at Chicago retired; and, rather than hire a replacement while the instant (BN) application is pending, the Chicago office was closed and its functions were subsumed by the GBW's sales force in Green Bay.

[18] In this and other instances involving use of BN facilities, services will be performed for GBW "at cost," i.e., without a profit additive.

The total price to BN of the securities tendered is $2,220,550; and it has opted to stand on its offer notwithstanding the shortfall in the number of class B debentures on deposit.

While owners acquired the right to withdraw tendered securities after October 22, 1976, none have elected to do so.

SOO LINE, MILWAUKEE ROAD, AND CNW

As noted above, these railroads propose to purchase all the assets, properties, and business of the GBW for the consideration of $4 million in cash and to assume its liabilities. Exceptions to the assumption of liabilities include dividends, income taxes, any obligations as between GBW and its stockholders or debenture owners, and any obligation to be performed by GBW after the closing date of the offer on December 31, 1977. This offer is contingent upon the approval by this Commission for simultaneous abandonment of the following trackage owned by the GBW: (1) between a point 500 feet east of Arcadia and a point one-quarter mile west of the Industrial Park at Wisconsin Rapids; (2) between Plover and Manawa; (3) between New London and Seymour; and (4) between the west side of Howard Street and the east side of Garden Street in Green Bay. The segments proposed for abandonment thus comprise 146 of the total 250-mile GBW main-line system.

The remaining 104 miles of main line would be divided into five segments for individual operation by the various applicants as follows: (1) *CNW*—that portion of GBW's line at the east end between Kewaunee and Green Bay and that portion between New London and Manawa; (2) *Soo Line*—the portion from a point one-quarter mile west of the Industrial Park in Wisconsin Rapids to Plover, including the branch lines to Biron and Stevens Point which are appurtenant to that segment; and (3) *Milwaukee Road*—the portion between milepost 17.6 in Seymour and milepost 2.3 in Green Bay and between Winona and a point 500 feet east of Arcadia.

The offer as extended to GBW by applicants is subject to several conditions. One of the principal conditions appears to be that until the closing date "there shall not have been any material adverse change in the financial condition" of GBW. In addition, the agreement among the three lines themselves contains other provisions. Each railroad has agreed to pay one-third of the $4 million purchase price and to be obligated for one-third of the assumed liabilities. Each applicant would receive one-third of the GBW rolling stock and equipment and each would receive one-third of the track and other reusable material from the 146 miles of prospectively abandoned line, either in kind or by salvage proceeds. And each would receive one-third of the proceeds of the sale of GBW's real estate, buildings, and other facilities. CNW's representative estimated the net salvage value of track and materials for the 146 miles slated for abandonment as $4,700,000 plus land value of $700,000. He also estimated the value of real estate owned by GBW in the city of Green Bay, not including the improvements thereon, as $2,100,000.

In a separate provision, CNW has agreed to accord trackage rights to the Milwaukee Road at Green Bay between Tavil and CNW milepost 1.1 and between Warren Street and Baird Street, a total distance of 3.5 miles. For said trackage rights, Milwaukee Road would pay a portion of the operating and maintenance costs. The purpose of this bilateral agreement is to provide an alternative to Milwaukee Road's so-called "Alley Track" in the city of Green Bay.

Abandonments.—More particularly, the segments of GBW line proposed to be abandoned are the following: (a) between milepost 191.7 at Arcadia running in an easterly direction to milepost 97.7 at Wisconsin Rapids, a distance of 94 miles, in Trempealeau, Jackson, and Wood Counties; (b) between milepost 79.8 at Plover running in an easterly direction to milepost 49.2 at Manawa, a distance of 30.6 miles in Portage and Waupaca Counties; (c) between milepost 38.9 at New London running in an easterly direction to milepost 17.6 at Seymour, a distance of 21.3 miles; and (d) between milepost 0.5 to milepost 1.2 at Green Bay.

The three lines give as their reason for abandoning these four segments of the GBW is that these segments do not generate sufficient traffic to warrant continued operation. They point out that the segment of line between Arcadia and Wisconsin Rapids generated an average of only 5.3 carloads of traffic per mile of abandonment trackage in 1974 and 3.7 carloads per mile in 1975. On the segment between Plover and Manawa, traffic averaged only 2.3 and 2.0 carloads per mile in 1974 and 1975, respectively. The segment between New London and Seymour averaged only 10.1 and 6.5 carloads per mile in 1974 and 1975, respectively. Finally, the segment in the city of Green Bay generated no traffic in 1974 or 1975. Because of this paucity of traffic, the three lines contend that continued operation over these segments results in the uneconomic use of materials and equipment which will eventually cause an undue burden on interstate commerce.

The three lines are of the view that approval of their section 5(2) application in conjunction with the proposed abandonments will permit the coordination of the joint applicants' and the GBW's operations, so as to achieve a greater utilization of the joint applicants' tracks and facilities which will be beneficial to the joint applicants and to the shipping public. The track, ties, and other materials which will be removed from the lines sought to be abandoned will be used elsewhere on the three railroads' respective systems. These materials made available by the proposed abandonments will enable them to decrease their expenditures for track and other materials which would otherwise have to be purchased, if it were not for the approval of the proposed abandonments. Specific plans for salvage have not yet been developed.

Service will be provided by the three lines for traffic which originated at or was destined to points on the GBW line proposed to be operated by the joint applicants. This traffic would be handled by the three lines existing lines and connections with the GBW. Any overhead traffic of the GBW would be handled by the joint applicants via other existing routes or by the three lines via their existing lines and the lines of the GBW sought to be acquired and operated by the joint applicants. Traffic originating on segments of GBW to be abandoned could be transported to the nearest rail station for movement via joint applicants' existing lines. No estimate was made as to the number of carloads which would be diverted to other modes of transportation, should the proposed abandonments be approved.

Other savings claimed by the three lines should the proposed abandonments be approved are the maintenance expense and other expenses accruing to the lines sought to be abandoned, which are considered to be too high when compared to the revenues generated on the lines. There are approximately 1,772 acres in the right-of-way proposed for abandonment. If the proposed abandonments are approved, and the right-of-way is sold, the revenues generated from such sale will accrue to the joint applicants. Additional savings will be realized by the three lines from the savings in State taxes and also the savings in local property taxes, although the method of allocation of the local property taxes is not known to the three lines.

The rail stations closest to those which will be abandoned under the proposal and which generated traffic in 1974 and 1975 are shown below:

TABLE 5

Location	Population (1970 census)	Nearest alternative rail station
1. Independence	1,036	Nine miles at Arcadia (Milwaukee Road), via H 93.
2. Whitehall	1,486	Fourteen miles at Arcadia via H 121 and H 93.
3. Blair	1,036	Seventeen miles at Arcadia via H 53 and H 95.
4. Taylor	300	Eighteen miles at Merrillan (CNW) via H 95 and H 121.
5. Hixton	300	Eleven miles at Merrillan via H 95 and H 121.
6. Alma Center	495	Four miles at Merrillan via H 121
7. Merrillan	612	Served by CNW
8. City Point	50	Seventeen miles at Babcock (Milwaukee Road) via H 54 and H 80.
9. Amherst Junction	141	Two miles at Amherst (Soo Line) via H 10.
10. Scandinavia	268	Nine miles at Waupaca (Soo Line) via H 49 and 17 miles at Manawa (CNW) via H 49, H 161 and H 110.
11. Shiocton	830	Seven miles at Black Creek (Soo Line) via H 54 and 9 miles at New London (CNW) via H 54.
12. Black Creek	921	Served by Soo Line

There has been substantial shipper and public opposition to the proposed abandonments, and this testimony is set out in appendix D hereto.

Operating plan.—As owners of the described segments, each carrier obligates itself to perform the following:

1. *Soo Line* shall:

(a) Be the line-haul carrier operating said railroad over its portions. Originate and terminate railroad business moving off of and onto said lines including business to and from former GBW industries at Stevens Point and Plover (including industries east of Plover toward Arnott) and between Plover and Wisconsin Rapids, including Biron. Intrastate shipments to and from Consolidated Papers, Inc., at Biron shall be handled by Soo Line as owner of said lines of GBW on a reciprocal switching basis as is the case now under present arrangements with GBW;

(b) At Wisconsin Rapids, assume obligations of GBW under present contracts with respect to switching the Industrial Park and the paper and pulp plants of Consolidated Papers, Inc., for the account of Soo Line, Milwaukee Road, and CNW.

(c) Keep open to the Milwaukee Road and CNW and maintain the gateway of Wisconsin Rapids for traffic moving on former GBW lines owned by Soo Line.

(d) Soo Line will establish routing with Milwaukee Road via Minneapolis/St. Paul on traffic moving from or to points on the Milwaukee and connections west of Minneapolis, and from or to points in western Canada. Routes will be established via Wisconsin Rapids from or to points on the Milwaukee Road in Iowa, southern Minnesota and Missouri, and from or to points beyond the Missouri River. Routes will be established via Chicago and Hilbert, Wis., from or to points on the Milwaukee in Illinois and Indiana, and from, to or via Louisville, Ky. Routes also will be established via Hilbert to the same extent routes are now provided via Green Bay with GBW.

2. *CNW* shall:

(a) Be the line-haul carrier operating said railroad over its segments of line, including interchanges with car ferries at Kewaunee, and originate and terminate railroad business moving off of and onto said lines to and from former GBW industries between Green Bay and Kewaunee, and between Manawa and New London.

(b) Assume all switching operations formerly performed by both the GBW and CNW, or by the GBW exclusively, in the city of Green Bay.

(c) Continue to operate the Ahnapee and Western Railway Co. pursuant to GBW's agreement dated December 14, 1971.

(d) Grant trackage rights to the Milwaukee Road over certain portions of CNW and of the former GBW in the city of Green Bay, to facilitate the Milwaukee Road's service.

3. *Milwaukee Road* shall:

(a) Be the line-haul carrier operating said railroad over its segments of line, and originate and terminate business moving off of and onto said lines to and from former GBW industries between Seymour and Green Bay, and between Winona and Arcadia.

(b) Assume all switching operations formerly performed by both the GBW and Milwaukee Road, or by the GBW exclusively, in the city of Green Bay.

4. Each of the railroads taking over the operation of a segment of GBW shall assume the same relationship to the other two railroads and shall have the same rights and obligations that the GBW had on that segment of railroad except:

(a) All industries at Green Bay (including industries now served exclusively by GBW) will be handled on a reciprocal switching basis.

(b) All agreements between the GBW and two or more of the parties hereto shall be construed after the closing date as being between the parties hereto, i.e., all rights, obligations, and liabilities shall be split on an equal basis, except as hereinbefore provided.

5. CNW and Soo Line will open and maintain Appleton, Wis., as the gateway for Soo Line traffic moving to, from or over the former lines of GBW (including A&W) acquired and owned by CNW.

6. Milwaukee Road will open and maintain Hilbert, in lieu of Black Creek, Wis., and Soo Line will open and maintain Hilbert as a new and alternative gateway for Soo Line and Milwaukee Road traffic moving to, from or over the former lines of GBW to be acquired and owned by Milwaukee Road and Soo Line.

7. With respect to traffic moving to, from or over the former GBW lines to be acquired and owned by Soo Line, CNW, and Milwaukee Road, existing routes and gateways presently opened to Soo Line, CNW, and Milwaukee Road, including but not

limited to the Twin Cities and Chicago, shall continue to be kept open and maintained by the Soo Line, CNW, and Milwaukee Road, and each shall be entitled to enumerated divisions of revenues.

Service features.—Table 6, which follows, provides a comparison between mileage, train service, and transit time provided by the GBW on its system at the present time, on the one hand, and that to be afforded pursuant to the three lines, on the other. Data relating to Soo Line, CNW, and Milwaukee Road assume that present train schedules will remain unchanged and that each will preserve to itself its longest haul whenever possible. The latter assumption derives from the fact that rail rates between the indicated points are based on short-line mileages and apply regardless of the carrier or routes actually used; that carriers participating in interline movements receive compensation in the form of divisions of through rates based in large measure on the relative extent of their participation therein; and that shippers often decline to exercise their right to provide complete routing instructions.

TABLE 6

From/to	Present service			Proposed service								
	Via GBW			Via Soo Line			Via CNW			Via Milwaukee Road		
	Number of miles	Number of trains	Time (hours)	Number of miles	Number of trains	Time (hours)	Number of miles	Number of trains	Time (hours)	Number of miles	Number of trains	Time (hours)
Kewaunee-Biron	135	2	18'45"	159	5	22	267	5	40'	337	4	34'
	1	Kewaunee-Wisconsin Rapids		CNW WF[1]	Kewaunee-Green Bay		WF	Kewaunee-Green Bay		CNW WF	Kewaunee-Green Bay	
	WF	Wisconsin Rapids-Biron		CNW WF	Green Bay-Appleton		290	Green Bay-Fond du Lac		244	Green Bay-Milwaukee	
					Appleton-Neenah		471	Fond du Lac-Adams[2]		401	Milwaukee-Wisconsin Rapids	
					Neenah-Stevens Point		497	Adams-Wisconsin Rapids		Soo WF	Wisconsin Rapids-Biron	
					Stevens Point-Biron		Soo WF	Wisconsin Rapids-Biron				
Biron-Kewaunee	135	2	6'20"	159	5	15	267	5	46'30"	337	4	37'
	WF	Biron-Wisconsin Rapids			Biron-Stevens Point		Soo WF	Biron-Wisconsin Rapids		Soo WF	Biron-Wisconsin Rapids	
	2	Wisconsin Rapids-Kewaunee			Stevens Point-Neenah		498	Wisconsin Rapids-Adams		400	Wisconsin Rapids-Milwaukee	
					Neenah-Appleton		472	Adams-Fond du Lac		245	Milwaukee-Green Bay	
				CNW	Appleton-Green Bay		297	Fond du Lac-Green Bay		WF	Green Bay-Kewaunee	
				CNW WF	Green Bay-Kewaunee		WF	Green Bay-Kewaunee				
Biron-Manawa	48	2	1'30"		N/A		233	5	57'	324	4	57'
	WF	Biron-Wisconsin Rapids					Soo WF	Biron-Wisconsin Rapids		Soo WF	Biron-Wisconsin Rapids	
	2	Wisconsin Rapids-Manawa					298	Wisconsin Rapids-Adams		400	Wisconsin Rapids-Milwaukee	
							472	Adams-Fond du Lac		245	Milwaukee-Hilbert-Appleton	
							295	Fond du Lac-Appleton		CNW WF	Appleton-Manawa	
							WF	Appleton-Manawa				
Manawa-Biron	48	2	14'		N/A		233	5	44'	324	4	59'
		Manawa-Wisconsin Rapids					WF	Manawa-Appleton		CNW WF	Manawa-Appleton	
		Wisconsin Rapids-Biron					290	Appleton-Fond du Lac			Appleton-Milwaukee	
							471	Fond du Lac-Adams			Milwaukee-Wisconsin Rapids	
							497	Adams-Wisconsin Rapids		Soo WF	Wisconsin Rapids-Biron	
							Soo WF	Wisconsin Rapids-Biron				
Manawa-Winona	164	1	5'		N/A		280	4	43'	348	4	74'15"
	1	Manawa-Winona					WF	(Manawa-New London		CNW WF	Manawa-New London-Appleton	
								(New London-Appleton		442	Appleton-Hilbert	
							290	Appleton-Fond du Lac		244	Hilbert-Milwaukee	
							471	Fond du Lac-Adams		255	Milwaukee-Winona	
							495	Adams-Winona				
Plover-Kewaunee	118	1	5'30"	142	5	23.66	279	5	49'	348	4	39'30"
				WF	Plover-Stevens Point		Soo WF	Plover-Wisconsin Rapids		Soo WF	Plover-Wisconsin Rapdis	
					Stevens Point-Neenah		498	Wsiconsin Rapids-Adams		400	Wisconsin Rapids-Milwaukee	
					Neenah-Appleton		472	Adams-Fond du Lac		245	Milwaukee-Green Bay	
				CNW	Appleton-Green Bay		297	Fond du Lac-Green Bay		CNW WF	Green Bay-Kewaunee	
				CNW WF	Green Bay-Kewaunee		WF	Green Bay-Kewaunee				

See footnotes at end of table.

TABLE 6—Continued

From/to	Present service			Proposed service								
	Via GBW			Via Soo Line			Via CNW			Via Milwaukee Road		
	Number of miles	Number of trains	Time (hours)	Number of miles	Number of trains	Time (hours)	Number of miles	Number of trains	Time (hours)	Number of miles	Number of trains	Time (hours)
Plover-Seymour	65	1	1'40"	123	5	38'30"	260	5	71'	329	4	47'
					Plover-Stevens Point		Soo WF	Plover-Wisconsin Rapids		Soo WF	Plover-Wisconsin Rapids	
					Stevens Point-Neenah		498	Wisconsin Rapids-Adams		400	Wisconsin Rapids-Milwaukee	
					Neenah-Appleton		472	Adams-Fond du Lac		245	Milwaukee-Green Bay	
				CNW	Appleton-Green Bay		297	Fond du Lac-Green Bay		WF	Green Bay-Seymour	
				Milw WF	Green Bay-Seymour		Milw WF	Green Bay-Seymour				
Seymour-Arcadia	175	1	5'20"		N/A		320	5	72'30"	374	4	72'30"
							Milw WF	Seymour-Green Bay		WF	Seymour-Green Bay	
							290	Green Bay-Fond du Lac		244	Green Bay-Milwaukee	
							471	Fond du Lac-Adams		255	Milwaukee-Winona	
							495	Adams-Winona		WF	Winona-Arcadia	
							Milw WF	Winona-Arcadia				
Wisconsin Rapids-Kewaunee	132	1	5'30"	156	5	16'15"	264	4	41'	334	3	26'45"
				WF	Wisconsin Rapids-Stevens Point		498	Wisconsin Rapids-Adams		400	Wisconsin Rapids-Milwaukee	
					Stevens Point-Neenah		472	Adams-Fond du Lac		245	Milwaukee-Green Bay	
					Neenah-Appleton		297	Fond du Lac-Green Bay		CNW WF	Green Bay-Kewaunee	
				CNW	Appleton-Green Bay		WF	Green Bay-Kewaunee				
				CNW WF	Green Bay-Kewaunee							
Winona-Green Bay	214	1	10'20"		N/A		284	3	21'30"	335	2	46'30"
							482	Winona-Adams		254	Winona-Milwaukee	
							472	Adams-Fond du Lac		245	Milwaukee-Green Bay	
							295	Fond du Lac-Green Bay				
Green Bay-Winona	214	1	6'50"		N/A		284	3	35'	335	2	45'30"
								Green Bay-Fond du Lac			Green Bay-Milwaukee	
								Fond du Lac-Adams			Milwaukee-Winona	
								Adams-Winona				
Arcadia-Biron	99	2	4'55"		N/A		177	4	48'	161	4	48'
	2	Arcadia-Wisconsin Rapids					Milw WF	Arcadia-Winona		WF	Arcadia-Winona	
	WF	Wisconsin Rapids-Biron					482	Winona-Adams		254	Winona-New Lisbon	
							497	Adams-Wisconsin Rapids		401	New Lisbon-Wisconsin Rapids	
							Soo WF	Wisconsin Rapids-Biron		Soo WF	Wisconsin Rapids-Biron	
Arcadia-Kewaunee	228	1	11'45"		N/A		339	5	40'30"	393	4	55'
							Milw WF	Arcadia-Winona		WF	Arcadia-Winona	
							482	Winona-Adams		254	Winona-Milwaukee	
							472	Adams-Fond du Lac		245	Milwaukee-Green Bay	
							297	Fond du Lac-Green Bay		CNW WF	Green Bay-Kewaunee	
							WF	Green Bay-Kewaunee				

[1] WF - Way freight train.

[2] CNW service between Fond du Lac and Adams is performed by operating through Clyman Junction.

The table demonstrates not only time and mileage comparisons between the present and proposed systems, but it also shows the number of trains which would be needed to handle a single car between any two given points. As reflected in the data, between any two main-line points on the GBW (i.e., Winona-Green Bay, Arcadia-Kewaunee, Plover-Kewaunee, Wisconsin Rapids-Kewaunee, et cetera), the same GBW train moves a typical car all the way. In the case of branch-line points, such as Biron, a maximum of only two trains is required for a movement. By way of comparison under the three lines' plan, four trains would be needed between Manawa-Winona, Plover-Kewaunee, Plover-Seymour, Seymour-Arcadia, Arcadia-Biron, and Arcadia-Kewaunee. Likewise, no less than three train movements would be needed to handle a car between any other two points on GBW, excepting Green Bay-Winona, where Milwaukee would need two trains and CNW three trains. Though not included in that table, cars moving via single-line CNW service between Winona and Kewaukee would require movement and interchange switching in four trains, and the joint service of Milwaukee-CNW would involve two Milwaukee trains, an interchange to CNW at Green Bay, and then an additional train movement via CNW to Kewaunee. On the GBW between those same two points, the principal interchange points for overhead traffic on GBW, this movement is accomplished by a single train.

Also, there is another factor not reflected in the schedules but which has a bearing in evaluating the service features of the three lines' plan—frequency of train service. At present, the GBW is providing at least two trains daily to serve all mainline points on its entire route extending from Winona to Kewaunee. This service has been economically feasible because the large volume of overhead traffic via the entire route supports such train service via intermediate points which, if left by themselves, might not warratnt such service. Pursuant to the abandonments proposed by the three railroads, no longer would this heavy traffic volume be available to support the frequent daily train service at such points as Arcadia, Whitehall, Manawa, Seymour, et cetera. For example, the three-railroad plan calls for service at Seymour only three times a week, as compared with the four trains per day available there at the present time.

Furthermore, an important service aspect is seen by comparing the transit time of 35 hours projected by CNW from Green Bay to Winona with the 7 hours presently scheduled by the GBW. Thus, the three lines proposal could potentially delay by approximately 1 day the transit time for all the westbound ferry traffic as well as all other traffic westbound from Green Bay.

Projected savings.—The record indicates that abandonment of much of the present GBW lies at the heart of the three lines' proposal, with the remainder of the system to be acquired by the three railroads. Therefore, the GBW as an entity would not be existent to save money or to combine with on a "giving effect" income statement. At the same time, the three lines expect to save no expenses of their own. In fact, it is projected that they will incur additional expenses if they take on the additional services contemplated. Thus, their claim of savings is not used in the traditional sense of section 5 consolidation proceedings. They have taken the position that the savings claimed would benefit the railroad industry as a whole.

Applicants claim that significant annual savings will be achieved in four areas, as indicated below. These will be considered seriatim.

SAVINGS CLAIMED BY THREE RAILROADS

Reduced train service	$879,987
Maintenance of GBW track	599,873
Stations and terminals	1,036,525
Administrative, sales, and accounting	300,000
Total	2,816,385

1. Reduced train service.—The $879,987 savings claimed here represents the difference between GBW's estimated expenses incurred in operating its trains and the expenses the three lines would incur under their operational proposals. GBW's total train operating expenses, however, are shown as $1,324,959, of which $915,559 is allocated to operation of trains 1 and 2, and the remainder, $409,400, reflects GBW's cost of performing local service between Wisconsin Rapids and Manawa and between Stevens Point and Wisconsin Rapids. Since the latter amount is approximately the same as the $444,972 the three lines claim would be entailed in operating their new local service trains, it appears that the net savings of $879,987 is due entirely to the proposed retirement of GBW trains 1 and 2.

But that "saving" is largely illusory because the three lines did not factor into their calculations the offsetting costs of handling the substantial volume of traffic which now moves overhead on GBW trains 1 and 2 to and from Green Bay and Kewaunee. Much of this traffic, by reason of the abandonment of key sections of GBW's line, is likely to move over their regular service routes without involving their proposed new local service trains.

2. Maintenance costs.—The three lines contend that $599,873 will be saved by the proposed abandonment of 146.6 miles of trackage. However, in order to forecast any savings with a reasonable degree of accuracy, two additional facts are needed: (1) maintenance costs experienced by GBW on the segments to be abandoned, and (2) additional maintenance costs which will accrue to applicants' lines when the GBW cars are rerouted thereover. The three lines have made no showing in the record as to either of those facts.

3. Stations and terminals.—Here, the evidence consists of a summary statement to the effect that coordination of stations and terminals will produce annual savings of $1,036,525.

A major portion of that amount, $853,355, is attributed to switching reductions at Green Bay. That sum equals the entire estimated cost to GBW of providing switching service at Green Bay. Again, no offset is shown as to the future cost to applicants of switching approximately 30,000 cars at Green Bay and making up the proposed additional trains at the same point. Inasmuch as 47 of the 67 industries switched by GBW at Green Bay today are not being switched by CNW or Milwaukee, there would be completely new switching for them under the proposal. Nowithstanding this fact, the three lines maintain that this switching could be performed "without any additional switching or cost." The three lines produced no probative evidence to show how these extensive industrial switching, transfer, and train makeup services would be performed at no additional costs.

4. Administrative, sales, and accounting savings.—While it appears likely that some savings would be achieved in this area upon cessation of GBW as an operating entity, savings of the magnitude claimed ($300,000) are apt to be realized only over a period of years. Applicant provided no details concerning the proposed savings; nor have they indicated any offset expense to be incurred by retaining GBW clerical and sales personnel on their respective payrolls or by providing severance pay to personnel in those categories where employment may be terminated.

In sum, the three lines claim of $2,816,385 in savings upon implementation of their proposals is left largely unsubstantiated on this record.

Employee protection.—The three lines have stated a willingness to accept the "New Orleans" conditions. Also, they will use their best efforts to employ GBW employees on their respective systems. As to nonunion personnel, they intend to absorb them into their management structures to the "maximum extent possible." Similarly, in terms of contract employees, the three lines have agreed to "the extent feasible" to employ "that number of sellers' contract employees needed to operate the terminals on their respective portions of seller's line." Also, as regards pension benefits, any exempt employees not employed by one of the three lines would have available to them the same benefits as if they continued to work for the GBW until the age of 65, with such benefits to be funded by the three lines.

Under a "worst case" estimate, they calculate maximum employee protective costs as $3.3 million, including relocation costs and severance pay. That figure is premised on the assumption that 100 of the 261 "excess" union employes would accept transfer and 161 would be severed. However, they emphasize that severance of GBW employees is unlikely since, by normal attrition, the three lines would have openings for all "excess" GBW workers within the space of a single year.

In addition, the record also indicates that the appropriate representatives of the United Transportation Union (UTU) would attempt to negotiate employee protection pursuant to the Railway Labor Act as a supplement to whatever protective conditions might be imposed by this Commission. At this juncture, however, UTU is not yet prepared to describe the specific conditions that would be requested on behalf of their members.

Financial terms and conditions.—The three lines each propose to pay one-third of the purchase price and will be obligated for one-third of the assumed liabilities of the GBW. Each applicant will operate its own trains, engines, and cars over its acquired segment of the GBW. The purchase price will be paid from funds in their respective companies without issuing securities or borrowing money for such purpose. It is further contemplated that any obligations of GBW which are assumed will be paid in cash when due. The proposed transaction thus will not result in an increase in total fixed charges of the three railroads. The offer was duly considered by the GBW's board of directors and was rejected by unanimous vote on March 23, 1976.

Financial data.—As of December 31, 1975, Soo Line's total assets were $324,011,589, including current assets of $66,025,056. Its current liabilities totaled $32,786,542; and it had long-term debt of $97,318,005 and shareholders' equity of $150,394,228. A 5-year profile of its revenues and net income from operations on 4,600 miles of line in seven upper Midwestern States is as follows:

Year	Railway operating income	Net income
1971	$124,477,555	$8,558,681
1972	140,651,034	11,608,510
1973	168,324,179	17,882,696
1974	179,792,319	14,883,974
1975	161,154,786	12,920,781

Approximately 55 percent of Soo Line's stock is held by Canadian Pacific Limited, a major transcontinental railroad in Canada, with 1974 operating revenue in excess of $1.5 billion.

Milwaukee Road's balance sheet as of December 31, 1975, shows total assets of $680,512,000, including $74,971,000 in current assets, $508,142,000 representing depreciated value of its transportation related properties, and $81,371,000 in investments and income therefrom. Its liabilities include $88,812,000 current, and $6,261,000 in long-term debt due within 1 year. Shareholders' equity totaled $321,227,000. There follows a listing of its revenues and net income derived from operations over 10,200 miles of line in 16 States during a 5-year period.

Year	Railway operating income	Net income (loss)
	$295,751,000	$(22,196,000)
1972	312,832,000	(8,643,000)
1973	355,390,000	3,405,000
1974	394,676,000	11,402,000
1975	381,092,000	(21,067,000)

CNW's balance sheet as of December 31, 1975, shows total assets of $446,743,537, including current assets of $94,631,485, and total transportation properties less depreciation of $335,942,574. Its liabilities include current liabilities of $113,996,361, long-term debt due within 1 year of $28,098,514, and shareholders' equity of $9,375,607. For the periods indicated, its revenues and net income from operations on approximately 10,000 miles of line in 11 Midwestern States were as follows:

	Railway operating income	Net income (loss)
1972 (7 months)	$216,431,979	$8,472,437
1973	416,681,378	13,799,295
1974	484,957,071	(982,771)
1975	459,046,374	(16,322,700)

PUBLIC WITNESSES

Overview.—As indicated above, the substance of the testimony of shippers and other public witnesses who appeared at the hearings, approximately 65 in number, is set forth in appendix D. For convenience, evidence of witnesses having common interests is considered therein under appropriate captions.

Virtually all of the witnesses, including representatives of various labor organizations, have high praise for the quality of GBW's service and favor the BN proposal as the best available means of assuring its continuance, assuming that the *status quo* is no longer possible as a long-term option. The few shippers opposing the BN application are not located on the line of GBW, and their opposition arises from concern lest approval have adverse consequences on the ability of Soo Line, Milwaukee Road, and CNW to continue adequately to serve their facilities.

Opposition to the three lines' proposal is nearly universal and is based mainly on concern over loss of GBW as a competitor and on perceived deleterious effects that breakup of its line would have upon car-ferry services at Kewaunee and on present rapid transit times afforded by GBW. Shippers on segments of GBW's line for which abandonment authority is sought are apprehensive about their ability to continue in business if abandonment occurs. A subsidiary theme is expressed by some shippers who consider retention of cross-lake ferry service important in preserving short-line distances on class rates to and from eastern territory.

Shippers of paper and paper products account for the greatest volume of traffic moving over GBW's line. Those shippers receive raw materials (lumber) principally from western origins and ship finsished paper and lumber products outbound, predominantly eastbound. Inbound shipments move over the entire length of the GBW and are interchanged at East Winona, while eastbound shipments often move over GBW to the Kewaunee car ferries.

The paper manufacturers have adopted and adhere to policies of allocating their traffic among the various rail carriers serving their plants with a view to fostering healthy competition and to assuring the continued ability of each to provide needed cars and quality service.

Considerable support for the BN proposal was received from shippers of food and related products. These include vegetable canners and dairy, meat, and grain processors. Opposition to the three lines' proposal was uniform among this group.

The dairy and meat processors are primarily concerned with the referigerated railcar supply situation in Wisconsin. Presently, GBW has no "reefer" cars of its own, and these shippers believe that approval of the BN application would increase the availability of such cars due to BN's large fleet.

Several of these shippers are exporters in foreign trade, utilizing in some instances the Public Law 480 program administered by the U.S. Department of Agriculture. They want rapid and low-cost transportation to both the west and east coasts and believe that retention of GBW's line is essential to those goals.

Most of the dairy and meat processors and vegetable canners utilize the GBW and the Kewaunee car-ferry primarily on traffic moving to eastern destinations. Also, the car-ferry and the GBW are used by certain food processors on inbound carloads of salt from Michigan. As a group, these shippers emphasize their need for expeditious transit times and, for that reason, they have avoided routing their shipments via the Chicago gateway. To varying degrees, all of these shippers question the continued viability of the Kewaunee car-ferry operations if the GBW is not retained as an operating entity. In this regard, they believe that the three lines would not solicit cross-lake routings but, instead, would prefer to route traffic via Chicago to obtain longer revenue hauls over their systems. They believe that the ferry has been continued due only to the efforts of the GBW to solicit traffic for cross-lake movements.

Chemical, petroleum products, and fertilizer shippers compose another category of shippers supporting the BN application. This group includes several agricultural cooperatives who are primarily receivers of inbound shipments of chemical fertilizers. Those shipments usually originate east of Wisconsin and move via the cross-lake ferries in order to avoid delays often attendant upon routing through Chicago. They also desire retention of the GBW line so as to avoid transit delays on inbound shipments from the West.

Processors of steel and metals also desire retention of the cross-lake car ferries and the entire GBW line. Steel scrap dealers are primarily concerned with inbound shipments from eastern origins via the cross-lake ferries. However, considerable portions of their volume also are routed from western origins over the GBW. Shippers and receivers of finished steel and metal products move outbound and inbound shipments over both the cross-lake car ferries and the western portion of the GBW.

Shippers on the western segment of the GBW are in a different situation. Those in Independence and Whitehall face total abandonment of rail service if the three lines' proposal is approved, while shippers in Arcadia and portions of Buffalo County will be on a branch line whose only connection would be westward to East Winona. Arcadia and East Cochrane shippers use the entire length of the GBW on outbound shipments to eastern destinations. Western shippers are engaged in a wide range of enterprises. Their concerns almost uniformly revolve around anticipated disruption (either by outright loss or circuitous routing) of a reliable and expeditious existing service if the three lines' proposal were approved.

Governmental and civic organizations in Wisconsin and Michigan express strong opposition to the three lines' proposal. They are primarily concerned over reduction in rail competition (particularly in Green Bay) and diminished service which they fear will occur if the three lines' proposal is adopted. They believe that the cross-lake car ferry would lose its greatest proponent if the GBW were discontinued as an operating entity. They also believe that the servie alternatives proposed by the three lines are, at best, inadequate and, at worst, totally unworkable.

In particular, the city of Green Bay supports the BN application. The expression of this support was voted by the Common Council on October 19, 1976. Several factors influenced this decision, but the most important was the Council's perception of the BN proposal as offering the greatest potential for sustaining the cross-lake car ferries. The Council believes that without the existence of the cross-lake ferries, GBW would become a very marginal line. Also of significance was the lack of job assurance for the 400 or more employees of the GBW, if the three lines' proposal was approved. The mayor of the city of Manawa supports the BN application and opposes the three lines' proposal. He believes that placing Manawa on a branch line, as envisioned by the three lines' proposal, would adversely affect practically all of the industry in Nanawa. Also, the mayor is of the opinion that the existence of rail service is essential to Manawa's future growth, since industries considering locating in Manawa consistently inquire as to the availability of rail service. For similar reasons, the representatives of other communities along the line of GBW (Seymour, Blair, and Independence) support the BN application.

The Brown County Board of Harbor Commissioners supports the BN application. It fears that implementation of the three lines' proposal inevitably would lead to a tonnage reduction at the port of Green Bay because the abandonments contemplated therein would isolate the port from its most direct connection with points in the Midwest.

The port of Milwaukee, through its board of Harbor Commissioners, believes that BN control of GBW and the rate advantages attendant thereto could divert some cargo (particularly USDA tonnage moving under Public Law 480) away from Milwaukee. During the 1975 navigation season, Milwaukee was allocated Public Law 480 cargoes which approximated one-third of the port's general cargo. The Board asks that any approval of the BN application include a condition whereby BN would guarantee that rates via the GBW will continue to provide equality between Green Bay, Milwaukee, and Chicago; and that BN participate in joint rates with the CNW, Milwaukee Road, and Soo Line on cargoes to the port of Milwaukee via the route encompassed in the BN application. The board's position is supported by the Great Lakes Seaway Users (a nonprofit organization composed of shippers and receivers of international traffic domiciled in Wisconsin and the surrounding area) and the Salentine Company, a licensed customs broker and freight forwarder dealing in export/import shipments.

The Wisconsin Association of Manufacturers and Commerce (representing 1,950 firms) and the Wisconsin Manufacturers' Association (with 1,600 member firms) both support the BN application.

The Wisconsin Department of Transportation, through testimony of Professor John F. Due of the University of Illinois, opposes both the BN application and the three lines' proposal. Professor Due believes that GBW will be able to survive and continue to render quality service as an independent entity because the major threat to its viability (i.e., collapse of car-ferry service at Kewaunee) has been eliminated by actions of the States of Wisconsin and Michigan to insure continued operation of the ferries; that Soo Line, Milwaukee Road, and CNW would be grievously harmed by traffic losses of the magnitude contained in their diversion estimates; and that under BN control GBW service will be less efficient. In the latter respect, he points to various studies tending to show that locally managed railroads are better able to tailor services to their customers and that large railroad systems do not, in fact, achieve economies of scale.

The State of Michigan, the Michigan Department of State Highways and Transportation, and the Northwest Michigan Regional Development Commission support the BN application as a necessary means of assuring continued viability of the ferry services and the Ann Arbor Railroad. They fear that breakup of GBW's line inevitably would lead to loss of traffic needed to sustain the ferries and the Ann Arbor. The Chambers of Commerce of Cadillac and Traverse City, and the Michigan Rail Action Association support the BN application essentially for the same reasons.

Labor organizations represented at the hearings all urge approval of the BN application as best serving the interests of union members. Those organizations are: The National Maritime Union of America (representing car-ferry employees), the Machinists Union, Brotherhood of Maintenance-of-Way Employees, GBW Firemen and Engineers (Local), International Brotherhood of Firemen and Oilers (Council 15), and the United Transportation Union (representing GBW conductors, brakemen, and yardmen).

POSITIONS ON BRIEF

Numerous parties have filed briefs containing exhaustive arguments in support of their respective positions. Their arguments, to the extent found relevant, have been or will be considered elsewhere in this report. Their basic positions are as follows:

BN and GBW jointly urge prompt approval of the BN's proposal without conditions save those normally imposed to afford protection to labor and to assure continued free flow of traffic.[19]

Soo Line, Milwaukee Road, and CNW state that approval of their proposal is in the public interest because it will streamline the rail system in Wisconsin in furtherance of the objectives of the Railroad Revitalization and Regulatory Reform (4R) Act of 1976 (Public Law 94-210), and will avoid large and injurious traffic diversions inherent in BN control of GBW. If, despite their objections, the Commission looks with favor on the BN proposal, the three lines urge as essential that any approval be subject to specific conditions the substance of which is set forth in appendix F to this report.

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[19] Six days after briefs were due in the proceedings designated in foot 1, BN and GBW submitted a substitute for page 91 of their timely filed brief. The three lines filed a motion to strike the tendered page on the gound that it represents a belated effort to add new substantive material. The motion has merit, and the tendered page is hereby stricken.

In order of preference to it, Consolidated Paper, Inc., sets forth three acceptable results in these proceedings, to wit: approval of the BN application subject to certain conditions (see appendix F) approval of the BN application without conditions, and preservation of the *status quo,* i.e., continued independent operation by the GBW. It emphasizes that under no circumstances could it support the three lines' proposal. However, it states that if any reason or circumstances develop which would lead the Commission to approve the three lines' proposal, that as a minimum necessary to protect Consolidated's position, it requests the conditions outlined in appendix F.

The State of Michigan and the Michigan Department of State Highways and Transportation urge approval of the BN application, taking no position either for or against imposition of conditions.

The Public Service Commission of Wisconsin strongly recommends approval of the BN application subject to conditions specified in appendix F. The Wisconsin Department of Transportation (WISDOT), however, views preservation of the *status quo* as the best solution to the issues presented in these proceedings. In its opinion: (1) GBW is well able, financially and otherwise, to continue as an independent line, especially now that the future of the car-ferry service has become bright due to combined Federal and State action; (2) approval of the BN application would result in unwarranted diversion of revenue from the three lines; and (3) the unjuries to the public interest resulting from implementation of the three lines' proposal far outweigh any benefits incident thereto. WISDOT also supplies a set of conditions (see appendix F) for imposition in the event the BN application is approved, but it stresses that the conditions are "for the Commission's information and due consideration only and *** [are] not in any way intended to indicate *** [WISDOT] advocacy of BN control with conditions."

The Department of Justice did not participate in the development of the evidentiary records in these proceedings. Rather, its petition to intervene was filed and granted after conclusion of the hearings. While taking no position with respect to the BN application, it opposes the three lines' proposal because, in its opinion, approval would substantially lessen competition and lead to deterioration of railroad service in Wisconsin.

Railway Labor Executives' Association (RLEA) represents, among others, railroad employees of all the carrier participants herein. It recommends approval of the BN application, subject to modified "New Orleans type" employee protective conditions, "and as further modified by the provisions of Section 405 of the Rail Passenger Service Act (45 U.S.C. 565)."

The Great Lakes Seaway Users, a nonprofit association, and the Board of Harbor Commissioners for the City of Milwaukee oppose the BN application because, in their view, the proposed control of GBW would allow BN to continue and extend "its policies of controlling single line movements of products for export by naming a rate from the point of origin to the port of export that is lower than a combined route with other carriers to another port"; and if the application is approved, it requests imposition of conditions requiring "that present rate parity between Milwaukee and Chicago be maintained and that future rates from origins on the new *** [BN] system provide for movement of cargo to the Port of Milwaukee at the same rate that would be provided for movement of the cargo for export to the Ports of Green Bay and Chicago." In our opinion, the record herein provides an insufficient basis (and also an inappropriate vehicle) for resolving what appears to be longstanding rate grievances for which a normal and orderly channel of redress lies in the filing of a complaint alleging unlawful rates or practices. Accordingly, the position of the Seaway Users and the board will not be accorded further consideration in this report.

Joseph M. Drexler, representing a group of holders of GBW class B debentures who have not tendered their securities to BN in response to its purchase offer, filed a brief urging denial of the BN application because he considers the price offered for class B debentures to be inadequate, unjust, and unreasonable. The BN proposal, however, does not contemplate "a sale or reorganization of GBW." Rather, its implementation would effect a transfer of control, without in any way altering the legal rights and equity values inherent in its outstanding securities. The complaining debenture holders have exercised their prerogative to withhold their securities, and they have not shown an entitlement to additional protection or relief herein. Compare *Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co.*, 317 I.C.C. 261, 292.

PRELIMINARY MATTER

Alley Track.—We deem it appropriate to consider at this point a claimed service advantage of the three lines' proposal much emphasized by Milwaukee Road throughout the course of the hearings and again on brief.

As part of the agreement underlying the filing of the three lines' applications, CNW has promised Milwaukee Road that upon approval thereof it will grant to the latter certain trackage rights in the city of Green Bay. Milwaukee Road believes that acquisition of those trackage rights will enable it to abandon operations over a 1-mile segment of line which runs along the east bank of the Fox River within the business district of Green Bay, is flanked on both sides by closely adjacent commercial buildings (hence the description "Alley Track"), and crosses a number of city streets at grade level. Currently, Milwaukee Road operates six trains daily over that segment, each having an average consist of 25 cars.

The Alley Track has been an historic bane to Milwaukee Road. It is claimed that elimination will improve public safety and further the cause of urban development in Green Bay. Also, Milwaukee Road will be relieved of constant pressures (and expenses attendant thereon) to improve operational safety and to accommodate to ever-changing levels in surfaces of adjacent properties.

The Common Council of the city of Green Bay, however, does not share Milwaukee Road's view that the Alley Track problem is of such magnitude as to require resolution in this proceeding and in the manner proposed under the counterproposal, since it is on record as favoring approval of the BN application. In effect, the public body which officially represents the citizens of Green Bay has concluded that elimination of GBW service is too high a price to pay for the public benefits claimed. Further, the Industrial Development Authority of Green Bay fears that removal of the tracks would deprive a cluster of industries located to the north of the city of the only available alternative rail route in the event an emergency requires temporary closing of the "GBW bridge," a circumstance that has occurred several times in the past and once involved a period of 5 months in duration.

While recognizing that the matter has peculiarly local ramifications not fully developed on this record, it appears that operation by Milwaukee Road over trackage of CNW in Green Bay in lieu of operation over the Alley Track, as proposed, would afford at least some benefits to Milwaukee Road and the city of Green Bay. But we find those benefits to be of minimal significance on this record because, at best, they constitute advantages which are peripheral to the basic purposes of the counterproposal and appear achievable wholly apart from these proceedings through agreement between CNW and Milwaukee Road.[20]

Discussion and Conclusions

The acquisition proposals before us are clearly within the scope of section 5(2) of the Interstate Commerce Act; and in passing upon an application filed under that section, our overall task, as specified in section 5(2)(b), is to determine whether the transaction proposed therein is "consistent with the public interest," or would be so if reasonably modified. If we so find, section 5(2)(b) further directs that we "shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable." The phrase "consistent with the public interest" as used in section 5(2)(b) has a well defined meaning and has a direct relationship to the adequacy of our transportation system, to its essential need for economy and efficiency, and to the best utilization of transportation facilities. *United States* v. *Lowden*, 308 U.S. 225, 230 (1939).

Further, the phrase must be viewed in the context of the national transportation policy and the provisions of section 5(2)(c) which requires us to give weight, among other things, to (1) the effect of the proposed transaction upon adequate transportation service to the public, (2) the effect upon the public interest of the inclusion or failure to include other railroads in the territory involved in the proposed transaction, (3) the total fixed charges resulting from the proposed transaction, and (4) the interest of the carrier employees affected.

Also, we must estimate the scope and appraise the effects of a proposal on competitors and on the general competitive situation in the industry, *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87; and any resulting curtailment of competition is to be considered and weighed against service and other advantages of the proposal in our determination of whether approval will be in the public interest and will assist in effectuating the overall transportation policy.

In the instant proceedings, we have before us two proposals which are mutually exclusive in the sense that approval of the one necessarily precludes approval of the other. See *Ashbacker Radio*

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[20] In this we are assuming, as contended by Milwaukee Road, that the Alley Track is spur or industrial rather than main or branch line within the meaning of section 1a(1) of the Interstate Commerce Act. If the fact were otherwise, the counterproposal would be defective in that it does not include an application to abandon the Alley Track.

Corp. v. *Federal Communications Commission,* 326 U.S. 327, and *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 512, 520. Accordingly, our assessment of the proposals under the criteria above will involve weighing the relative merits of each with a view to determining what action of ours, including the possibility of denying both applications, will best serve the public interest.

With the above standards in mind, we shall proceed to consider the transactions here proposed; including a threshold matter which concerns the public interest value of GBW's service.

In that regard, the evidence is overwhelming that GBW is an efficiently run and well maintained railroad which, over the years, has provided consistent high-quality service to industries it serves, either directly or as a link (bridge) in connection with traffic moving both to and from points beyond its line. It is an aggressive competitor, handles substantial quantities of freight, and its operations consistently have been profitable. GBW is an historically healthy line and has become a recognized and relied-upon part of the Nation's rail transportation network. These circumstances, absent compelling countervailing considerations, favor a regulatory response herein likely to preserve and foster continuation of the service provided by GBW.

Both the BN and the three lines claim that their respective proposals will achieve that result. In this respect, the Soo Line, Milwaukee Road, and CNW emphasize that their joint application is not merely defensive, and that its implementation would assure continuance of all economically significant services of GBW while, at the same time, contributing toward rationalizing the rail system in Wisconsin.

In our view, however, the three lines' proposal is inferior to the BN application both from a service aspect and from the standpoint of other primary public interest considerations present in these proceedings, to wit: its relative effect upon competition and labor.

Service.—Under the BN proposal, GBW will remain in existence. It will receive overall policy guidance from BN, but its officers will retain a large measure of autonomy, especially with respect to operational matters. GBW will continue to provide service over its entire length of line, and there is every indication that there will be no decline in service either in quality or quantity.

GBW's prime utility as a transportation resource is to provide service in conjunction with other railroads in the movement of traffic to and/or from points located beyond its line; and, during a typical year (1974), such traffic accounted for the great bulk of its carloads and revenues. In that role, GBW service is highly complementary to, rather than competitive with, that of BN. The latter has been its principal rail connection, accounting for 40 percent of all interchanges effected by GBW west of Kewaunee in 1974. Comparable percentiles of the three joint applicants were: 24 percent with Soo Line, 18 percent with CNW, and 16 percent with Milwaukee Road.

Nearly one-half of GBW's annual tonnage and system revenue is derived from traffic moving across Lake Michigan via Kewaunee on ferries of the Ann Arbor (now ConRail) and C&O. While its service in conjunction with the ferries has been responsive to the needs of numerous shippers and receivers who find it convenient and regularly use the routing to avoid delays in transit often attendant upon alternative routings through the congested Chicago gateway, it has created a dependence to the extent that loss of either or both ferry services would seriously impair GBW's modest financial success and its ability to continue operations.

The ferry services have been beset with financial problems which have increased in severity over the years; and fear of their imminent collapse prompted GBW's board of directors unanimously to approve the agreement underlying the BN application. An approximate estimate of the revenue effect (1974 levels) on GBW from discontinuance of either or both ferry services and consequent rerouting of GBW's cross-lake traffic via Chicago is as follows: Revenue loss from AA and C&O discontinuance $3,408,337; from AA discontinuance only $2,203,286.

We recognize the approval of BN control over GBW by no means would assure continuance of the ferry services. The fate of ConRail-operated ferries depends upon subsidies, and the C&O ferries are the subject of an abandonment application yet to be decided by the Commission.

But BN control at least would be consistent with retention of those services. BN has been GBW's primary western rail connection on its bridge traffic moving to and from the ferries at Kewaunee; and during 1975 it handled nearly one-half (46 percent) of GBW's total bridge traffic.[21] It is in a position to, and (with the added incentive of a dominant financial interest in GBW) there is every indication that it will, sustain present near-maximum capacity loaded car sailings eastbound and that it will use its best efforts to improve revenue-load factors on west bound movements of the ferries.

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[21] Comparable percentiles of the three lines were 9 percent for Milwaukee Road and 7 percent each for Soo Line and CNW.

An additional public interest consideration lies in the circumstance that GBW, under BN control and having ready access to its extensive physical and technical resources, stands a far better chance of being able to survive and maintain service to industries on its line in the event ferry service via Kewaunee is diminished or ultimately discontinued.

In contrast to the BN application, the proposal advanced by the three lines contemplates GBW's elimination as an operating entity, abandonment of three intermediate segments (a total of 146 track miles) of its 250-mile main line, and dispersion of its rolling stock throughout their respective systems pursuant to a three-way division. That proposal and the consequent service alternatives resulting from its implementation are viewed as unacceptable by virtually all participants in these proceedings, including representatives of public bodies in Wisconsin and Michigan and all industries located along the line of GBW; and we find merit in their opposition.

As justification for their claim that the public interest will be served by the abandonments, the three lines point to the scant volume of carload traffic moving to or from points located on the involved segments and, in effect, ask us to consider those segments in isolation and without regard to their utility in connection with the overhead movements of substantial numbers of carloads. To do so, however, would be to adopt an exceedingly narrow approach to the overriding reality that the three segments are integral parts of GBW's main line and essential to the east-west flow of its main body of traffic. It is because of their fortuitous location, rather than the volume of traffic they generate, that the numerous small communities on those segments can be conveniently and inexpensively served by GBW; and that benefit—one which they have long enjoyed and heavily rely upon—should not be taken away, absent compelling reason.

Nor do we find merit in the three lines' statement that under their proposal shippers in communities on GBW's line which generate significant volumes of traffic, as well as shippers who use GBW as a bridge line in connection with transcontinental movements, will continue to receive service comparable to that provided by GBW. Those shippers are shown to have used GBW principally on traffic moving east and/or west of Wisconsin, for which its line of road across the central portion of that State provides a convenient and direct route; and they have found GBW's service to be consistent, reliable, and expeditious.

As noted in our discussion regarding table 6, however, the substitute service proposed by the three lines entails substantial increases in transit time due to circuitous routings and need for exchanging cars between as many as five intermediate trains; and we find that shippers accustomed to GBW's service are likely to experience a sharp decline in both frequency and quality of service under the three lines' proposal.[22]

Moreover, abandonment of key sections of GBW's line is virtually certain to impact adversely and severely on the volume of traffic moving via the ferries, thereby aggravating their already precarious existence. That prospect is further enhanced by the negative attitude toward cross-lake routings shared by each of the three lines. They provide connecting-line service on ferry traffic in those instances where shippers give specific routing instructions. But, historically, they have not solicited such routings, preferring instead to obtain their long haul to and from the Chicago gateway. And on this record, in contrast to BN's commitment to continue GBW's policy of actively soliciting cross-lake traffic,[23] the only statement of the three lines is their promise to maintain a physical connection with the ferries as long as they operate and to honor cross-lake routings when specified by shippers. However, in our judgment, the service alternatives afforded under the three lines' proposal will deter most shippers from continuing to use the cross-lake routings via Kewaunee, thereby increasing the possibility of termination of the ferry services.

Competition.—Though not an overriding consideration, the fact that implementation of an application filed under section 5(2) of the act will preserve or foster competition among carriers weighs in favor of a finding that its approval will be consistent with the public interest. Compare *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475, 505 (1966).

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[22] While we recognize that there is some flexibility to adjust schedules of connecting trains, it appears unlikely that any significant changes in that regard will occur. Those "other" trains operate on schedules geared to accommodate the flow of traffic generated at points throughout the systems of the three lines; and the latter have made no claim on this record that they view the involved GBW traffic as sufficient in volume to warrant special priority status in their overall operations.

[23] BN's preeminence as a connecting line with GBW effectively dispels the suggestion of the three lines that it will adopt a solicitation policy favoring its own long haul via Chicago at the expense of cross-lake routings via GBW. BN has not done so in the past, and there is much less reason to expect it will do so after acquisition of a controlling proprietary interest in GBW.

Here, GBW is shown to be an effective and efficient competitor for traffic moving to, from, or through the involved area in central Wisconsin; and it has become an established and relied-upon component of the transportation resources in that area. Under the BN proposal, GBW will continue in existence, performing essentially the same type of service it has provided in the past.

In contrast, the competitive scene in mid-Wisconsin would be sharply altered upon implementation of the three lines' proposal. In addition to eliminating a main rail service route across Wisconsin found convenient and used by many shippers, the elimination of GBW as an operating entity would leave seven communities which generate the bulk of its on-line traffic with one less railroad. As discussed above, that result is not warranted by service considerations; and we conclude that the benefit of a favorable showing inures to the BN under the "competitive impact" criterion.

Labor.—Both BN and the three lines express willingness to be bound by employee protective conditions like those imposed by the Commission in prior proceedings of this type, the so-called "New Orleans" Conditions.

At best, however, those conditions are palliative in nature, serving to ease but not cure personal hardships attendant upon loss of jobs. The public interest in minimizing adverse effects on employees is better served by approval of a consolidation proposal wherein there exists a strong likelihood of continuing economic need for employment at or near present levels.

Between the two alternative applications before us, we think clear that the BN proposal offers the greater probability of continued employment and job security for GBW personnel. Under BN control, GBW will operate much as it has in the past, and nearly all of its employees will be needed to work in their present positions. While some reductions will be effected in GBW's sales and traffic departments, BN has committed itself to accomplishing that result through attrition.

In contrast, the three lines' proposal is unspecific as to the exact number of unneeded GBW employees. Upon cessation of GBW's operations and abandonment of large segments of its line of road, the number of employees who would be adversely affected is almost certain to be substantial. And even assuming, as claimed by the three lines, that their systemwide attrition rates are sufficient to absorb all displaced GBW personnel within 2 years, there will be interim hardships, including the necessity for uprooting and relocating many employees and their dependents.

In these circumstances, we find the BN application far superior to the three lines' proposal from the standpoint of relative effect on employees of GBW.

Savings.—During the year following implementation of its proposal, BN estimates it will be able, through economies in operations and sales resources, to reduce GBW's expense by nearly $100,000 as a minimum; and while that amount is likely to increase each year over a 5-year period and beyond, the sums involved are relatively nominal.

Under the three lines' proposal, an estimate of achievable savings is not available (see discussion, *supra*), but it appears probable that the total initial savings resulting from cessation of a large portion of GBW's operations and sale or reuse of its physical assets will be substantial. The three lines, therefore, have the benefit of this criterion.

Diversion.—Notwithstanding the overall superiority of the BN proposal under the criteria considered above, we would be reluctant to approve its application if that action would lead to an impairment of the ability of the three lines to render essential transportation service within their respective operating areas.

For that reason, we have carefully considered in appendix C the potential for diversion of traffic from the three lines resulting from BN control of GBW.

As found in appendix C, however, their maximum exposure to revenue loss through diversions is far less than the $5,357,374 anticipated by the three lines. To recapitulate conclusions in that appendix: at most, Soo Line could lose $773,472 or 0.48 per cent of its annual system revenues for 1975; Milwaukee Road, $662,548 or 0.2 percent of its 1974 revenues; and CNW, $858,791 or 0.2 percent of its 1975 revenues.

Assuming diversions at those levels will occur, their effect upon operations of the three lines will not be significant, in our judgment. Soo Line is in a relatively strong financial position; and while Milwaukee Road and CNW have experienced deficits in recent years, that situation appears not to have inhibited their ability to continue to provide a full range of services, and their financial outlook is improving.[24] Moreover, through intensified efforts to improve car supply and service, they should be able to retain much of the traffic classified as divertible.

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[24] In 1976, operating revenues of the three lines reached an all time high, with Soo Line receiving $189,289.000; Milwaukee Road, $440,233,000; and CNW, $529,200,000. Net income totals were as follows: Soo Line, $16,201,000; Milwaukee Road, -$12,079,000 (vs. -$12,067,000 in 1975; and CNW, $3,050,000 (vs. $16,322,700 in 1975). Source: R-1 Reports on file with the Commission.

Third alternative.—WISDOT regards these proceedings as the most important Wisconsin railroad regulatory matters in modern history, potentially affecting all major Wisconsin railroads. Along that line, they have consistently argued that "the overriding public interest" would be best served by continued independent operations of the GBW.

By the way of synopsis, WISDOT has stated that the following factors support its case that the "consistent with the public interest" criterion can only be satisfied in this instance by denial of both the BN and three lines' applications.

1. The Three Wisconsin Railroad's proposal (F.D. 28143) has serious public interest deficiencies and is, therefore, unacceptable.
2. There has been no demonstrated need for anyone to acquire the GBW.
3. The GBW can operate profitably as an independent railroad in the short and long term.
4. Retention of an independent GBW is consistent with the overriding Wisconsin public interest.
5. Continued independent operation of GBW will not deprive the public in GBW territories of continued adequate, if not excellent, transportation service.
6. BN control of GBW would seriously jeopardize the Three Wisconsin Railroads ability to maintain adequate transportation service to the entire public through harmful diversions of revenue.
7. Retention of GBW connecting car ferry service is not dependent upon approval of BN control.
8. Railroad employee interests are best served by an independent GBW.
9. No significant public benefits through economies could be realized under BN-GBW unification.

WISDOT notes that there is Commission precedent for the "status quo" option espoused herein. WISDOT also notes the fact that GBW is already supporting its connecting car ferry service, and that as a major representative of the Wisconsin public interest in rail transportation matters, it must be cognizant of potential injury to other important Wisconsin railroads and act accordingly. Finally, WISDOT states that retention of an independent GBW is consistent with the entire public interest, now and for the future.

In our view, the crux of the "third alternative" raised by WISDOT lies in the evidence of traffic diversion demonstrated on this record. Based upon WISDOT's consideration of the traffic diversion question, the agency estimates that the need operating income loss to the CNW would be some $1.2 million; the figure for the

Milwaukee Road would be approximately $0.9 million; and the effect on new income for the Soo Line would be some 5 to 6 percent of net income.

Our analysis of this consolidated record leads us to a different conclusion that the position advanced by WISDOT on the instant matter. We have made a detailed study of the traffic diversion question. The results of that analysis are set forth in appendix C hereto.

It is our view that there appears to be validity to the understandable concerns expressed by WISDOT regarding the absence of standard data procedures for presenting traffic diversion information. We do appreciate that the lack of standardized procedures in prior matters has made it more difficult for independent parties, such as WISDOT, to understand the diversion issue. In this highly technical area of traffic diversion analysis, it must be understood by all of those concerned that these aspects of the Commission procedures in this complex field that even our new regulations (Ex Parte No. 282 (Sub-No. 1)) *Railroad Consolidation Procedures,* 348 I.C.C. 771 (1977) do not remove the judgmental factor from such studies.

The detailed analysis set forth in appendix C of the methodoligy employed by this Commission in the present situation in essence represents an *ad hoc* rationale as to the procedures employed in the Commission's own traffic analysis. The final judgments that we have rendered on the divertibility issue in the instant case have followed the same general approach, regardless of the procedures first utilized by the litigants in presenting such data to the Commission for the purpose of introduction into the record.

It is our overall conclusion that, while we are in agreement with some of the subsidiary positions advanced by WISDOT, our own traffic analysis leads us to the ultimate conclusion that the railroad protestants to the BN application have not demonstrated that they will likely be substantially injured, if the proposed transaction in F.D. No. 27770, et al., were to be consummated.

The record also demonstrates that shipper support for the "third alternative" has been minimal, with some ten to fifteen shippers entering testimony which can best be characterized as not opposing such an option—"so long as the present service levels on the GBW continued indefinitely *in futuro.*" In that regard, a realistic appraisal of this record leads us to the general observation that we would be hard pressed to find a basis for rendering such assurances about future service levels on the GBW—given the array of economic unknowns and improbables that may prove to have a major bearing on rail operations in this territory in said future period.

With reference to the Kewaunee ferry issue, we do share the view of WISDOT that the BN has clearly indicated that it will make no direct financial commitments to the car ferries. (Tr. 243-244). Conversely, however, we do not see that any of the representations of WISDOT on this same subject achieve the level of a commitment to preserve car ferry service. Thus, notwithstanding the fact that WISDOT characterizes numerous factors as indicating that the future car ferry service is "bright" without BN control, none of these factors has ripened into the nature of a commitment, or agreement, which has been admissible into evidence in these proceedings.

We understand that while perhaps BN control of the GBW will not result in direct financial assistance to the ferry situation on the part of the BN, it should be recognized that any prudent rail management, once having made a substantial investment in terms of both monies and time to acquire control of another rail carrier, will in all likelihood take whatever steps are necessary to protect its investment. Thus, it is our opinion, that the BN acquisition of control of GBW will clearly have a tendency to at least stabilize the Kewaunee ferry situation.

Conclusions.—In light of the above, we conclude that the benefits to the public attendant upon approval of the BN application far outweigh any adverse effects; and that the application should be ganted subject to standard traffic conditions set forth in appendix E, as a condition to our approval of this transaction we will incorporate by reference the reporting requirements set forth in Ex Parte No. 282 (Sub-No. 1), *Railroad Consolidation Procedures,* 348 I.C.C. 771, 812-As exhibit A-16, and to the provision for protection of employees set out in *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271, modified by the arbitration provisions approved in *St. Louis Southwestern Ry.—Pur.—Alton and Southern R.*, 342 I.C.C. 498, and the provisions for employee protection established pursuant to section 405 of the Rail Passenger Service Act.

At present, Consolidated Papers' facilities at Biron are served exclusively by GBW. Because of its proximity to Wisconsin Rapids, we believe that a condition requiring that Biron be treated as being within the switching limits of Wisconsin Rapids, with GBW agreeing to perform switching operations on interstate traffic moving berween Wisconsin Rapids and Biron on behalf of Soo Line, Milwaukee Road, and CNW at fair and reasonable charges, would be in the public interest and is warranted. The condition will serve a dual purpose by opening up Biron to competitive railroading, and by further minimizing potential losses of the three lines by enabling them to obtain additional revenue on traffic moving via their lines to and from Biron. Under this condition, compensation for GBW's participation in such movements will be on a lower basis, i.e., it will receive a relatively nominal switching charge rather than a division of the through rate. We consider BN's estimate that the condition will operate to reduce GBW's revenues by $749,000 to be highly speculative. In any event, that amount will be more than offset by potential revenue gains in the range discussed above.

We see no need for imposition of the numerous other traffic and operational conditions sought by various participants. In its essential aspect, the BN proposal, though vigorously opposed by the three lines, is a relatively modest one. Our action here is entirely permissive, and BN's or GBW's security holders may yet elect not to consummate the transaction. Moreover, the conditions were urged as necessary to alleviate or compensate for anticipated revenue losses of a magnitude found not probable herein. Many relate to traffic situations well beyond the geographic scope of GBW's operations, and appear designed to correct felt inadequacies resulting from prior consolidation proposals, *e.g.*, the *Northern Lines* case, *supra*. Finally, we observe that CNW's requested condition 6 represents an attempt to have us rewrite or interpret the standard "DT&I" traffic protection conditions. We find no basis for doing so in this record.

ULTIMATE FINDINGS

In reaching our decision, we have considered all the major issues involved. While some matters argued or raised in the briefs have not been specifically referred to, they have nevertheless been considered and found to be without merit; and, to the extent those matters include motions, appeals, or other requests not specifically granted herein, they are hereby denied.

In F. D. No. 27770, we find that the purchase price reflects the result of arm's length bargaining, fairly represents the going concern value of GBW and the market price of its securities, and is just and reasonable; that the transaction will not result in any significant increase in fixed charges since applicant BN intends to and can readily pay for the involved securities out of its cash account and GBW has only minimal debt capital and no changes are proposed in its fixed charges.

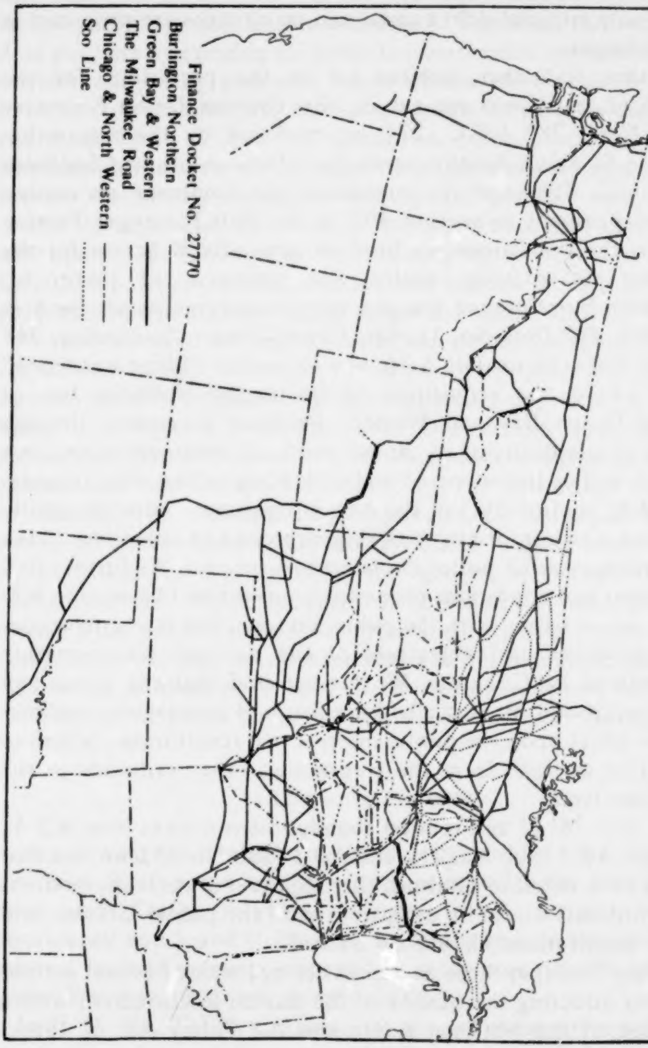
We further find that, subject (a) to the provisions for the protection of employees set out in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271, as modified by the arbitration approved in *St. Louis Southwestern Ry.—Pur.—Alton and Southern R.*, 342 I.C.C. 498, and the provisions for employee protection established pursuant to section 405 of the Rail Passenger Service Act, (b) to the conditions set forth in appendix E herein for the maintenance of existing routes and channels of trade, (c) incorporation by reference the reporting requirements set forth in Ex Parte No. 282 (Sub-No. 1), *Rail Consolidation Proceeding*, 348 I.C.C. 771, 812—As exhibit A-16, and (d) to the "Biron condition" described above, the acquisition by Burlington Northern Inc. of control of Green Bay and Western Railroad Company, through ownership of a mojority of its capital stock and other securities, is a transaction within the scope of and which meets the requirements prescribed by section 5(2) of the Act, is consistent with the public interest, and is in conformity with the purposes and objectives of the national transportation policy declared by Congress. We further find that the terms and conditions proposed or prescribed by section 5(2) of the act, is consistent with the public interest, and is in conformity with the purposes and objectives of the national transportation policy declared by Congress. We further find that the terms and conditons proposed or prescribed are just and reasonable; and that no adverse effect upon the public interest will result from failure to include in or exclude from the transaction other railroads in the territory involved.

In F. D. No. 28143 and related abandonment docket Nos. AD-57 (Sub-No. 3), AB-7 (Sub-No. 21), and AB-1 (Sub-No. 55), we find that applicants have failed to establish that approval of their applications (counterproposal) would be consistent with the public interest, and that their applications should be denied.

We further find that these decisions are not major Federal actions significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

APPENDIX A


Finance Docket No. 27770
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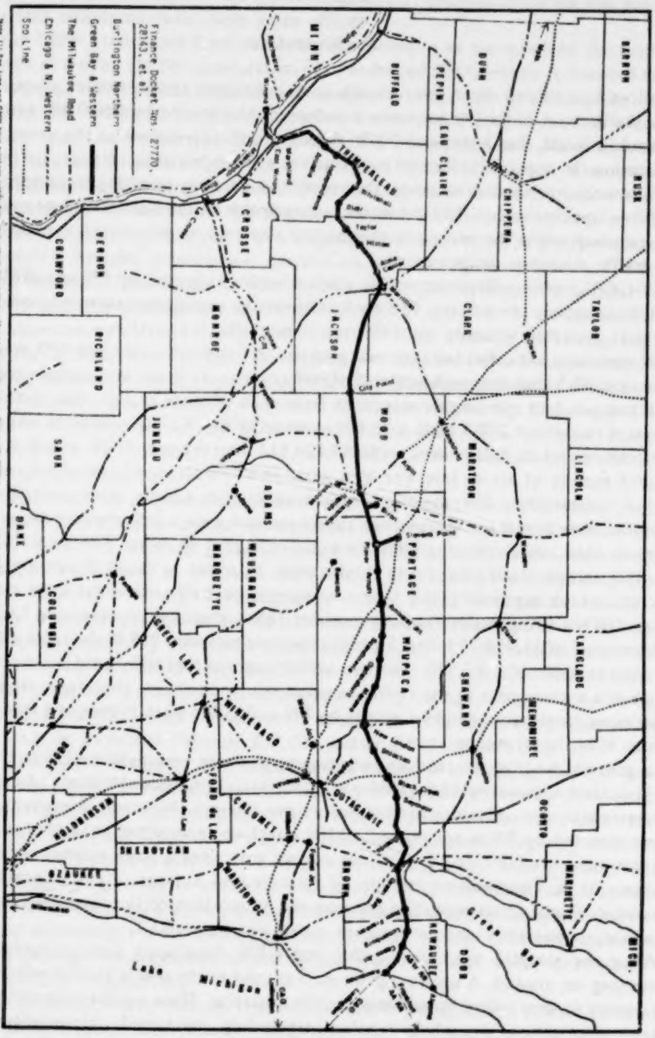
Green Bay & Western
The Milwaukee Road
Chicago & North Western
Soo Line
0 50 100 200 400 MILES

APPENDIX B


Finance Docket Nos. 27770, 28143, et al.
Burlington Northern
Green Bay & Western
The Milwaukee Road
Chicago & N. Western
Soo Line
BARRON
RUSK
TAYLOR
LINCOLN
LANGLADE
DUNN
CHIPPEWA
PEPIN
EAU CLAIRE
BUFFALO
CLARK
MARATHON
SHAWANO
MENOMINEE
OCONTO
MARINETTE
MICH.
TREMPEALEAU
JACKSON
WOOD
PORTAGE
WAUPACA
OUTAGAMIE
BROWN
KEWAUNEE
DOOR
Green Bay
LA CROSSE
MONROE
JUNEAU
ADAMS
WAUSHARA
WINNEBAGO
CALUMET
MANITOWOC
VERNON
CRAWFORD
RICHLAND
SAUK
MARQUETTE
GREEN LAKE
FOND DU LAC
SHEBOYGAN
DANE
COLUMBIA
DODGE
WASHINGTON
OZAUKEE
MINN.
Lake Michigan
City Point

APPENDIX C

Traffic studies

Railroad parties to these proceedings each submitted traffic studies purporting to show the amount of freight revenues which would be gained by BN-GBW and lost to Milwaukee Road, Soo Line, and CNW through traffic diversions in the event the BN application is approved. No formal studies were presented relative to probable traffic/revenue gains and losses to the respective carriers resulting from approval of the three lines' proposal. There follows a description of the studies and an evaluation of their adequacy in the two areas of expertise involved, to wit: sampling methodology and traffic diversion judgements.

BN-GBW studies.—Separate traffic studies were conducted by BN and GBW using random sampling procedures. For each railroad the population sampled consisted of abstracts covering virtually all 1972 interline traffic.[1]

BN abstracts were divided into two groups: "A" abstracts with $10,000 revenue or more, and "B" abstracts with under $10,000 revenue. A 1-percent sample composed of 10 independent subsamples was taken from each of these groups. The sample for A abstracts contained 2,013 cars, with BN revenue of $1,132,702, while the sample of B abstracts included 7,212 cars, with $5,104,611 in revenue. GBW conducted a 5-percent sample of all its interline abstracts. This sample consisted of 10 systematic random subsamples. The abstracts appearing in this sample were identified as B abstracts. The 5-percent sample was supplemented with a 100-percent sample of all interline abstracts containing GBW revenue of $1,000 or more. The abstracts falling into this category were known as A abstracts. In order to avoid duplication, any A abstracts which appeared in the 5-percent sample were eliminated from the B abstract group. GBW's 100-percent sample contained 785 A abstracts representing 13,346 cars with revenue of $1,758,779. The 5-percent sample included 909 B abstracts with 1,517 cars and revenue of $167,778. The two carriers agreed that BN would make the traffic judgments with respect to the traffic handled jointly by them. Therefore, all abstracts containing movements handled jointly by BN and GBW were eliminated from GBW's A and B abstract groups.

In general, we find the random sampling procedures employed by BN and GBW to be in accord with acceptable standards of statistical practice. Methods of computing the estimates and related standard errors are correct. We note, however, that the frame selected by BN encompassed all BN interline movements, including traffic that did not move via GBW. As a result, its sample contained a large number of irrelevant movements, a circumstance which, in turn, led to a large, almost unsatisfactory, variability factor in its sampling because the proportion of the waybills from which information was used and projections made was very small.

After the samples were drawn, BN and GBW developed joint procedural steps governing the studies. A uniform printout was used in the traffic studies which showed all pertinent data taken from the interline abstracts. Data on the printout included origin, destination, complete routings (including junctions), commodity, weight, freight, and revenue accruing to each carrier. In addition to the above information, a copy of the waybill was attached to the printout on originating and terminating traffic which gave additional data for the traffic judgment. If more information was required, the carriers contacted their field sales offices.

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[1] Certain abstracts were excluded as not eligible for the sampling frame, to wit: advance only items, prepaid only items, LCL traffic, miscellaneous charge amounts, local traffic, and company material shipments.

BN and GBW eliminated from the computer printout as noninvolved the following categories of traffic: (1) BN local traffic, (2) westbound BN interline forwarded traffic, (3) eastbound BN interline forwarded traffic destined to Southwestern Freight Association or Southern Freight Association territories, (4) eastbound BN interline forwarded unit coal trains and iron ore and taconite movements, (5) eastbound BN interline forwarded traffic originating in Colorado, Nebraska, Kansas, Missouri, Iowa, Illinois, Kentucky, Wyoming, and South Dakota (Edgemont to Deadwood), destined to official territory, (6) eastbound BN interline received traffic terminating on BN, (7) westbound BN interline received traffic originating in Southern Freight Association or Southwestern Freight Association territories, (8) all traffic between California, Arizona, Nevada, Utah, Oregon, Washington, and western Canadian points, (9) BN intermediate traffic moving via its "Central Corridor" (i.e., its route between Denver and Chicago through Grand Island, Nebr.), (10) BN intermediate traffic originating or terminating in Southern Freight Association, or Southwestern Freight Association originating or terminating in the west, (11) BN interline received traffic terminating in Illinois, Missouri, Iowa, Kansas, Nebraska, Colorado, Wyoming, and South Dakota (Edgemont to Deadwood), (12) GBW local traffic, (13) GBW interline forwarded traffic destined to official territory, and (14) GBW interline received traffic originating in official territory.

Using the above set of guidelines, BN's computer printout was scrutinized, under the supervision of the traffic evaluator, in order to identify traffic considered to be involved. When that task was performed, the BN traffic expert then reviewed all the traffic which was marked as involved traffic. After eliminating some additional traffic from the computer listing, approximately 1,500 traffic evaluation sheets were physically obtained. At this stage there was a further reduction in the number of evaluation documents by the traffic evaluator. Additional information was obtained on the remaining documents and the traffic expert made his final evaluations. The judgments as to the probability of effecting routing changes ranged from 0 to 100 percent. In the traffic study, all judgments related to effecting routing changes which would result in increased revenue for BN and/or GBW ranged from a 50- to 100-percent probability. Some of the major factors included in making these judgments were service, equipment ownership, and identity of the carrier serving the consignee.

The BN traffic study was based upon the following premises: (a) cross-lake services of both Ann Arbor and C&O will be continued; (b) the available capacity and current volumes of traffic of cross-lake vessels will not permit any major shift in traffic volume from the Chicago gateway to cross-lake service; (c) BN and GBW will continue to maintain and to keep open all routes by existing junctions and gateways, and divisions of revenue applicable via connecting carriers, and (d) BN and GBW will not restrain or curtail the right of industries served by the GBW to route traffic over all or any available routes or gateways.

Results of the BN study indicate that BN and GBW would obtain relatively nominal revenue gains through diversion of traffic from the three lines; and all situations in which probable diversions were found involved shipments originating on the line of BN or its subsidiaries and destined to Green Bay. Revenuewise, BN concluded that Milwaukee Road, CNW, and Soo Line would experience maximum losses of approximately $81,800, $76,400, and 0 respectively, at 1974 revenue levels.[2]

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[2] BN used an expansion factor of 25.3 percent based on its average revenue per car derived from its QCS Reports for 1972 versus 1974 to arrive at the 1974 revenue level.

After the GBW sample was drawn and joint procedures were established, the GBW traffic evaluators had each sample abstract manually extracted from its file of abstracts. At this juncture, all traffic considered not involved based upon the aforementioned guidelines was eliminated. In making judgments as to the divertibility of traffic, the following principal factors were considered by the GBW evaluators: (1) present route and alternative routes, (2) location of industry or warehouse, (3) whether the location was exclusively served by GBW or was open to competition, (4) the railroad or railroads performing switching operations, (5) the carrier furnishing the equipment, (6) whether the industry or warehouse is open to reciprocal switching, (7) whether the industry or warehouse is on private property or on leased railroad property, (8) BN and GBW joint solicitation, and (9) equipment and service.

The GBW traffic study results show that following BN control, both the BN and GBW stand to gain through traffic diversions revenues corresponding in amount to estimated losses of $201,614 for Milwaukee Road, $186,125 for CNW, and $8,560 for Soo Line.[3]

Combining the results of the BN and GBW traffic studies produces an estimated 1974-level revenue gain of $565,001 for the two participants. That gain is apportioned $109,953 for the GBW and $455,048 for the BN. Based on those studies, Milwaukee Road, CNW, and Soo Line would have 1974-level revenue losses of $283,414, $262,525, and $8,560, respectively.[4]

Milwaukee Road criticizes the BN and GBW traffic studies as being outdated. It points out that 1972 was the year before it gained access to Louisville, Ky., and that southeastern-northwestern traffic moving via Louisville (versus traffic movements via BN junctions at Woodlawn/Centralia) figured prominently in BN's traffic judgments. In addition, 1972 was the very year in which Milwaukee inaugurated its "ford Fast" train which recaptured some automobile traffic that had been lost to GBW and it also was the year before Ann Arbor's car ferry operation between Manitowoc and Ludington was discontinued.

Further, Milwaukee Road finds it incredible that the only diversions from its line found by the BN expert involved two shipments moved in four cars from Albany, Oreg., to Green Bay. Also it assails as inconsistent GBW judgments that some shipments moving from southeastern points and destined to points on GBW were divertible while other similar movements were not.

CNW contends that the BN and GBW diversion studies are so tainted with basic errors that they cannot be used for any significant purpose. Among other things, it points out that although ability to supply cars is conceded to be a major factor in obtaining traffic, neither the BN nor GBW experts appear to have given that circumstance any weight in their diversion judgments, notwithstanding BN's ownership of 8 percent of the national car fleet. Also, CNW scores the BN traffic expert's failure to check whether his assistant adhered to instructions in excluding traffic from the computer printout. Further, it strongly disagrees with the decision of GBW's expert to completely exclude from his study, as not susceptible of revenue gains through diversion, GBW interline forwarded and received traffic to and from the official territory.

Soo faults BN for limiting the scope of its study to traffic routed over BN-GBW or BN traffic where the unification through control would permit extended BN hauls, thereby excluding from consideration any probability of diverting traffic moving over lines of other railroads between competitive points or junctions. It also assails the BN and GBW traffic experts for making diversion judgments without attempting to obtain the benefit of each other's knowledge of the traffic moving over their respective lines. In particular, Soo observes that BN made all diversion judgments on joint (BN-GBW) interline traffic; and it argues that GBW should have been consulted for essential information on those movements. Another alleged weakness which Soo found in the GBW study was the failure of the GBW evaluator to determine and consider the post-control policies of BN as owner of that carrier and the advantages of control. Soo contends that the GBW traffic expert gave no consideration to service improvements, coordinated services, improved car supply, or assignment of cars. Further, Soo claims that the GBW evaluator gave no consideration to any additional benefits represented by the BN and GBW in a brochure, *A Partnership That Makes Sense*, which held out to the public that after control GBW would benefit from the BN's automated yard at Minneapolis, improved car identification procedures, industrial development, and BN's support services. Further, Soo takes issue with GBW's judgment that traffic moving between points on its line, on the one hand, and, on the other, Chicago and points in the southeast (*e.g.*, in Alabama and Mississippi) is not divertible because a BN-GBW routing via East Winona is too circuitous to be competitive with the relatively direct route of Soo and its Chicago connections. In this respect, Soo points out that the work papers of BN show several carloads moved over the described BN-GBW route during 1974.

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[3] Here, also, losses are stated at 1974 revenue levels. GBW used an expansion factor of 18.4 percent based on its average revenue per car derived from its QCS Reports for 1972 versus 1974.

[4] Gain and loss figures do not balance precisely because of the difference in divisions via various junctions.

In our opinion, the BN and GBW traffic evaluators were far too conservative in making their diversion judgments. In particular, we find, in several respects at least, their judgments are seriously flawed by: (1) failure to accord adequate consideration to the advantages of soliciting traffic inherent in BN's many and diverse physical resources and its aggressive, widely dispersed sales force; (2) numerous examples of inconsistent conclusions regarding essentially similar movements; and (3) exclusion from the GBW study of a large block of traffic which should have been evaluated, i.e., GBW interline forwarded and received traffic to and from official territory. Those limitations and deficiencies render the BN-GBW projected traffic diversion and loss estimates valueless in these proceedings except as an indication of *minimum* losses in revenues which would be experienced by other railroads resulting from BN control of GBW.

Milwaukee Road.—Milwaukee's study is based on 1974 traffic data. Rather than using a sample, the Milwaukee elected to review all the cars which it interchanged with the GBW or which either originated or terminated at the two points served commonly by it and the GBW, i.e., Wisconsin Rapids and Green Bay. The basic materials for the diversion study consisted of data stored on computer tapes. Printout data included, among other things, information showing origin, destination, name of consignor and consignee, destination carrier, on and off junctions, commodity, car ownership, and freight charges. Revenues accruing to Milwaukee which appeared on the tapes were estimated and did not reflect actual settlement revenues. The estimates, however, closely approximate Milwaukee's systemwide settlement revenue experience. In all, the Milwaukee traffic expert reviewed 29,514 cars listed on the printouts. He did not examine underlying waybills.

The Milwaukee study presupposes continued operation of the cross-lake ferries. In addition, the traffic evaluator assumed: (1) that the proposed control of GBW by BN had been fully accomplished prior to 1974 and all nonrecurring movements were evaluated as they actually moved; (2) that no other merger or acquisition which was not consummated prior to 1974 had affected the Milwaukee's traffic volume or consist; (3) that all then existing routes and rates remained in effect and no new routes and rates were established after BN control; (4) that BN-GBW service will improve through increased coordinations; (5) that the preblocked run through train interchange arrangements prevailing between BN and carriers such as Union Pacific, Southern, Louisville and Nashville, and Illinois Central Gulf railroads remained in full operation; (6) that additional BN general service and special equipment would be available to GBW for their disposal with specific car-hire expense benefits in effect; (7) that all BN sales personnel would be available to solicit traffic for the GBW; and (8) that special equipment either on an assigned or free-running basis would be made available at off-line stations to encourage routing of additional traffic to and via the GBW, across lake and otherwise.

The Milwaukee evaluator determined that of 7,344 carloads moved jointly with GBW during 1974, 3,971 were potentially divertible. He then made judgments as to probability of diversion[5] and concluded that 2,300 carloads (accounting for $818,224 in revenue to Milwaukee) were likely to be diverted. With regard to other interline traffic considered in the Milwaukee study (i.e., traffic not handled in conjunction with GBW but moved via Milwaukee to or from Wisconsin Rapids and Green Bay in 1974), the evaluator considered all such traffic (except TOFC movements) potentially divertible. The "other interline traffic" amounted to 22,170 carloads, of which Milwaukee anticipates 1,645 carloads (returning $540,819 in revenues) are likely to be diverted. Thus, following BN control, Milwaukee estiamtes that it stands to lose a total of 3,945 carloads and 1974 revenues of $1,359,043.

BN regards the Milwaukee estimate as a gross overstatement; and, after making what it believes are warranted adjustments, BN concludes that, at most, Milwaukee could incur a loss of $223,068 in annual revenues, an amount which is less than the $283,414 forecast in its own study. Specifically, BN faults the Milwaukee's evaluations as having been based on incomplete data. In this respect, it points out that the data used by the evaluator did not include actual revenues, the complete route of movement, and whether transit or stopoff shipments were involved. In addition, BN assails the general assumption made by the evaluator that in all cases there existed available and economic routes over which BN could divert traffic.

We find that Milwaukee has, in fact, overstated its probable losses, but not to the extent claimed by BN.

On interline traffic received by Milwaukee from GBW at Winona, Milwaukee estimated a loss of $180,385. Of that revenue, (1) about $100,000 was derived from cross-lake traffic handled by GBW as a bridge line and delivered by Milwaukee to consignees served exclusively by it,[6] and we find the probability of diversion to be nil; and (2) $8,627 came from cars originated by GBW but delivered at plants served exclusively by Milwaukee,[6] and at least $6,000 of that revenue appears to be non-divertible because, in our judgment, the likelihood of a routing change involving a junction less favorable to Milwaukee is remote on approximately 70 percent of those movements.

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[5] In making judgments, the Milwaukee evaluator recognized that, as between carrier participants in multi-line service, originating carriers ordinarily exercise the greatest influence over particular routings used, delivering carriers have the next most important influence, and intermediate or bridge carriers have the least influence. This assumes, of course, that shippers are amendable to suggestions from carriers or waive their right under section 15(8) of the act to specify complete routings, including junctions.

[6] On brief Milwaukee implies that the plants of these consignees are open to reciprocal switching. However, the record does not support that implication.

Approximately $204,760 of Milwaukee's projected revenue loss is attributed to cars moving to or from the plants of Consolidated Papers, Inc. Evidence presented by Consolidated (set forth at length in appendix D) is persuasive that it will make no significant departures from its longstanding policy of allocating traffic with a view to maintaining the competitive position and stability of all rail carriers serving its plants. Accordingly, we find that Milwaukee stands an excellent chance of retaining its relative share of Consolidated's traffic and all of the revenue in question.

Milwaukee also takes a revenue loss of $226,414 on multi-line movements involving traffic which it originated at Green Bay and which moved to ultimate destinations in Western and Midwestern States. GBW did not participate in any of those movements, and BN participation occurred only in isolated instances. Milwaukee supplied all of the cars used in those movements. In those circumstances, we think Milwaukee is in a strong position to, and probably will, retain all of this traffic and revenue.

Another claimed diversion loss, 455 cars or $160,829, involves traffic handled into Green Bay by Milwaukee for Fort Howard Paper Company (see appendix D). GBW was not included in any of those movements. BN, however, supplied and participated in the routing of 52 of those cars on movements which returned $11,508 to Milwaukee for its services as delivering carrier. We find the latter revenue probably divertible; but the remaining $149,321 is most likely to be retained by Milwaukee because, like Consolidated, Fort Howard is committed to maintaining its longstanding practice of allocating traffic equitably among the three railroads (CNW, GBW, and Milwaukee) serving its plant. In that respect, we note the Milwaukee traffic expert's candid comment concerning Fort Howard: "They'll treat you fair."

In sum, Milwaukee's diversion estimate of $1,335,043 appears to be overstated by at least $696,495. The difference, $662,548, represents the maximum revenue diversion that Milwaukee might experience following BN control. The latter total is less than 0.2 percent of Milwaukee's aggregate 1974 freight revenue of $362,903,000.

Soo Line.—Soo's study is based upon statistical sampling of traffic handled for a 12-month period extending from December 1, 1973 through November 30, 1974. Three principal classes of traffic were sampled, to wit: interline forwarded, interline received, and overhead. During the selected time period, there were 491,795 carload movements, of which Soo initially determined 13,972 carloads to be susceptible to diversion. Twenty-six separate strata, or subgroupings based upon geographical traffic patterns, were defined; and random samples of the cars from each stratum were drawn. There were a total of 563 sample carloads selected and studied in detail. Soo's traffic evaluator consulted waybills, reconstructed waybills, or abstracts for each of the sample movements and applied his diversion guidelines to them. The guidelines which were applied involved gradations of divertibility ranging from highly susceptible to no susceptibility. Although the sample size was small, it was adequate for yielding a precise estimate because of the use of a prescreening process which eliminated certain categories of movements as not susceptible to diversion, and because of the effective use of stratification.

In making his divertibility judgments, the Soo expert assertedly gave weight to factors such as plant location, single-line service, car supply solicitation, industrial development, allocation practices, carrier rate action, and transit, reconsignment, and stopoff privileges. As a result of the study, Soo projected a revenue loss of $1,727,377 for the 1973-1974 period, which, when escalated to reflect freight rate increases through December 31, 1975, amounted to $2,191,178. And of the latter revenue, it estimates that only 25 percent (about $548,000) would be savable through reduction in out-of-pocket expenses. Those would derive chiefly from use of less locomotive fuel and from lower per diem, freight car repair, and joint facility charges. Major expense items such as depreciation, taxes, interest on debt, repairs and maintenance of track, and wages will continue unabated notwithstanding traffic diversions.

BN asserts that the Soo traffic evaluator gave only lip service to many important factors governing routing of traffic and that, in actual practice, his judgments were based upon a very narrow range of considerations, i.e., carriers serving plant locations at origins and terminations, and relative distances of BN-GBW routes vs. those of Soo, including in some instances comparisons with potential rather than actual BN tariff routes. BN's restatement shows that Soo, at most, stands to lose through diversion $326,513 in revenue.

We find merit in much of the BN critique. $1,087,044, or approximately one-half of Soo's estimated revenue loss is attributed to traffic which it handles for Consolidated. However, as we have stated in connection with the Milwaukee study, we are persuaded that Consolidated will abide by its assurance to continue its allocation policies whereby, out of self-interest, it attempts to divide its traffic among all carriers serving its plants in a manner designed to preserve a viable service from each. Accordingly, we conclude that Soo is not likely to experience loss of any portion of the revenue in question.

In addition, the Soo has taken a $330,662 revenue loss on traffic it jointly handles with its parent, the Canadian Pacific (CP). This traffic comes from western Canadian provinces where most of it originates on the CP and moves southeast via Soo. The record indicates that CP solicits this traffic for movement over its lines in conjunction with a Soo movement. As the originating line on most of this traffic, CP has the greatest influence over its routing. Being the parent company, the CP has a vital interest in the financial performance of Soo and will see to it that none of this revenue will be lost to Soo.

There are other instances where it appears that Soo's diversion judgments are too narrowly based, but they will not be detailed here. Instead, we believe it sufficient to find that $773,472 is the maximum amount of revenue which Soo could lose following consummation of BN control. A loss of that magnitude represents less than 0.48 percent of Soo's 1975 railway revenues, which totaled $161,155,000.

Chicago and North Western.—CNW's study consists of a 5-percent sample of all cars it interchanged with the BN and GBW in 1972. The sample design was composed of 10 subsamples, each being a systematic sample with a separate random start. There were a total of 4,961 sample cars representing joint BN and CNW movements and 425 cars representing joint GBW and CNW movements. The sampling technique used by CNW was in accordance with sound statistical procedures and produced a relative error of only 3.8 percent, which is quite low for a study of this nature.

Of the 5,386 sample cars reviewed, the CNW traffic evaluator flagged a total of 508 cars that appeared to be potentially divertible. He then examined waybills and/or abstracts on all 508 sample cars and made divertibility judgments with respect to each after according what he considered appropriate weight to 16 principal factors, including origin and destination data, existence of reciprocal switching and team tracks, stopoff and transit service, shipper allocation practices, car supply, solicitation, and overall service. He concluded that of the 508 cars, 327 (representing 75 cars handled jointly with BN and 252 with GBW) would probably be be diverted, and, after applying proper coefficients of expansion, he found that CNW stands to lose at least $1,807,154 at 1975 revenue levels.

BN disagrees with many of the CNW expert's diversion judgments, and, based on its own analysis and restatement, it concludes that at most CNW would lose 1975-level revenue of $319,987.

We agree that CNW's projected losses are overstated by a substantial amount. Specifically, we find that claimed diversion of traffic/revenue handled by CNW will not occur in at least the three situations described below.

(1) Traffic of Consolidated Paper Co., accounting for 1975-level revenues of $854,585. As noted in our discussion of the Milwaukee and Soo studies, we give credence to Consolidated's intent to continue its policy whereby it attempts to allocate its traffic in a manner conducive to maintaining the economic well-being of all carriers serving its plants. CNW, however argues that it was justified in according little weight to that policy in making its diversion judgments because Consolidated expressly declined to make any guarantees and because circumstances easily can change so as to impel Consolidated, for service or economic reasons, to rely more and more on the resources of BN, including its large reservoir of cars.

We appreciate, but do not share CNW's apprehensions. The unpredictability of future economic circumstances is an inherent infirmity which all businesses, including railroads, have to live with; and, in that respect, Consolidated cannot be faulted for its declination to make a commitment to preserve indefinitely to CNW, Milwaukee, and Soo their present relative shares of its traffic. As to service considerations, we are confident that by maintaing competitive rates and high quality performance, CNW, Milwaukee, and Soo will be able effectively to counter allurements of unified BN-GBW operations; and in this they will be aided by the self-interest concern which has prompted Consolidated to adhere to its allocation policy in the past, namely: to avoid creating a situation where it becomes too dependent on any one carrier.

In addition, CNW is in a favorable position to retain the revenues it has received from Consolidated due to practical routing considerations. Thus, $789,865, or nearly all of the expanded Consolidated revenue which CNW found likely to be diverted, was derived from movements of four commodities, as follows:

(a) *Coal* moving from points in southern Illinois and western Kentucky to Consolidated at Biron, and accounting for expanded CNW revenue of $540,372. Most of those shipments originated on the line of ConRail and Illinois Central Gulf railroads at Stonefort, Ill.; and the remaining few cars originated at Spartan Mine, Ill., and Vogue, Ky., served by the Missouri Pacific and Illinois Central Gulf railroads. The shipments moved via those roads to Chicago (or South Pekin, Ill., in some instances), thence CNW to Wisconsin Rapids, and GBW to destination. There is no evidence in this record that coal from fields in and around southern Illinois has moved via East Winona to the Wisconsin Rapids-Biron-Stevens Point area of Wisconsin. The latter route is highly circuitious compared to the relatively direct route involving CNW chosen by Consolidated. Accordingly, CNW has what appears to be a dominant service advantage. Further, upon effectuation of the proposed consolidation there would be even less reason for routing BN-GBW because GBW would then be required to haul the coal 118 miles from East Winona for the same division of revenue it now receives for its 6-mile haul from Wisconsin Rapids to Barion.

(b) *Clay* moving from points in Georgia to Consolidated at Biron, and producing expanded CNW revenue of $77,978. The involved 11 carloads were routed Louisville & Nashville R.R. to Chicago, thence CNW to Green Bay or Wisconsin Rapids, thence GBW to Biron. Here it is apparent that Consolidated gives L&N its long haul; and there is no good reason to anticipate that, upon control of GBW by BN, it would shorthaul L&N by changing to a longer route involving L&N to a BN point such as Woodlawn or East St. Louis, Ill., thence BN-East Winona-GBW.

(c) *Pulpwood* moving from Minnesota and Wisconsin points to Consolidated at Wisconsin Rapids or Biron, and producing expanded CNW revenue of $38,755. Involved are 18 carloads, 10 of which were originated by BN and interchanged with CNW at Superior or Ashland, Wis., and the remaining 8 cars originated at points in Minnesota not served by BN and from which no tariff route exists via BN. The basic reason why BN has not participated in a routing via East Winona-GBW is that the BN line between Minneapolis and East Winona is double tracked and, for safety reasons, BN has insisted that pulpwood shipments routed to move over that segment be wired at shipper expense of approximately $20 to $30 per car. It is unlikely that approval of the instant control application will induce a change in the BN policy requiring wiring; and, in that circumstance, Consolidated can be expected to continue using routings which avoid the extra charge.

(d) *Paper products* moving from Consolidated plants at Biron and Stevens Point to Chicago, and accounting for expanded CNW revenue of $132,760. These carloads, 24 in number, were routed GBW-CNW and entailed movements of 297 miles from Stevens Point and 306 miles from Biron. In contrast, a GBW-BN routing via East Winona would involve movements of 461 and 440 miles, respectively. Because of high circuity, the latter routing is not apt to be used by Consolidated, except possibly in isolated, emergency-type situations. Nor is BN likely to solicit that routing since its use would cause GBW to perform hauls of 118 miles from Biron and 137 miles from Stevens Point for the same divisional revenue it presently receives for hauls of 6 miles from Biron to the CNW connection at Wisconsin Rapids and 48 miles from Stevens Point to the CNW connection at New London.

(2) Traffic of miscellaneous shippers, handling of which entailed stopoff service. Three sample cars representing expanded revenue of $32,760 are in this group. One of the cars carried canned vegetables from Seymour to North Kansas City via GBW-New London-CNW. The car stopped at Belgium, Wis., on the line of CNW to complete loading and, for that reason, no diversion is apt to occur. The second car hauled potatoes from Plover to Philadephia via GBW-New London-CNW-B&O, but it had been originally consigned to CNW's Woodstreet ("Potato & Onion") yard in Chicago. That convenience probably will preclude diversion. The third car handled a load of hispital beds and panels from Green Bay to El Paso, with a stopoff to complete loading at Stevens Point. The routing was CNW-New London-GBW-Merrillan-CNW-Kansas City and connections beyond. To accomplish the stopoff at Stevens Point, it was necessary for the GBW to be included in the routing. There is no reason to believe that the shipper would penalize CNW, who served its facility in Green Bay and furnished the car, by routing this car beyond Stevens Point via GBW-E. Winona-BN to Kansas City.

(3) Traffic moving from Chairmin Paper Products Co. (a wholly owned subsidiary of Procter & Gamble Co.) in Green Bay, on which CNW took a loss of $61,018 representing expanded revenue derived from 13 sample carloads. The cars could have moved from origin to destination via GBW-BN. Yet CNW served as originating carrier and was accorded its longest haul on each of the movements. This confirms the testimony of Charmin's representative (see appendix D) concerning its established allocation policy; and, in our judgment, like Consolidated, it will adhere to that policy so that none of this traffic will be lost to CNW.

In light of the foregoing, we conclude that CNW has over-stated its diversion exposure by at least $948,363, and that the maximum revenue loss which CNW may experience as a result of BN control over GBW is $858,791 or approximately 0.2 percent of its total 1975 system freight revenue of $411,157,000.

APPENDIX D

Public witnesses

MANUFACTURERS OF PAPER AND LUMBER PRODUCTS

Consolidated Papers, Inc., of Wisconsin Rapids, is the largest volume shipper on GBW's line. It operates plants at Wisconsin Rapids, Stevens Point, and Biron. At the Wisconsin Rapids facility, there are three divisions producing woodpulp, printing paper and paperboard, and paper products. Two of the three divisions are served by GBW, Soo Line, CNW, and Milwaukee Road. The third division is served by GBW but is open to CNW and Milwaukee Road through reciprocal switching. The switching for all three divisions is handled by the GBW.

At Stevens Point, there are two divisions, both served by the GBW and Soo Line. Here, switching is performed by both carriers. At Biron, Consolidated produces printing paper and is served exclusively by the GBW, with no reciprocal switching. The Biron facility is open to CNW, Soo Line, and Milwaukee Road through reciprocal switching on intrastate traffic only. On interstate movements, GBW performs connecting-line service as a line-haul carrier and is compensated on a divisional settlement basis.

In 1975, Consolidated received approximately 17,500 carloads of raw material and coal at the aforementioned facilities and shipped approximately 8,000 outbound carloads of paper and paper products. In order of importance, Chicago, eastern States, and California constitute its heaviest volume markets. Of Consolidated's total outbound traffic, an increasing percentage is being transported by motor carrier (251,489,243 of a total 871,888,893 pounds shipped in 1975 moved by motor). This has been due in part to a decline in the quality of rail services, and Consolidated believes that approval of the counterproposal would accelerate this trend. On shipments to most eastern destinations, it has found that utilization of the cross-lake car ferries provides much better transit times than movements via the Chicago gateway. It is concerned about CNW's willingness to promote cross-lake movements via Kewaunee, since that carrier does not encourage routings via car ferries at Manitowoc, a point it has long been authorized to serve. Consolidated also fears that the quality of service rendered to it by Soo Line would decline if the three lines' proposal were approved, since that carrier would have a monopoly on service at Biron and at Stevens Point.

Consolidated supports the BN proposal, believing that it will best assure continuance of GBW service and has the potential for easing the car supply situation in Wisconsin. Availability of an adequate car supply has been a perennial problem since its facilities are not located on a major transcontinental rail route; and it perceives the three lines' proposal as worsening that situation because GBW cars would be divided among the three applicants and used throughout their respective systems.

Consolidated has a longstanding policy of allocating its traffic among the carriers serving its facilities at Wisconsin Rapids, Stevens Point, and Biron in order to maintain competitive balance and a degree of discipline among them. It considers numerous factors in determining the relative portion of its traffic each carrier will receive, including: (1) availability of the carrier's equipment, (2) condition of the equipment furnished, (3) quality of service rendered by the carrier, especially speed and consistency of time in transit, (4) claims records, (5) rate matters, notably a carrier's willingness to publish competitive rate adjustments, (6) a carrier's willingness and availability to handle lower rated, inbound, raw material shipments, (7) promptness in providing information concerning the status of inbound and outbound movements, (8) customer requests, notably the destination of routings or carriers by Consolidated's customers, and (9) candor of carriers in revealing routing and solicitation policies.

Consolidated emphasizes that its allocation policy is a continuing one and that GBW's present significant share of its traffic is largely attributable to its proven ability to provide good service and cooperation in the areas outlined above. The resources and size of the BN would not assure any increase or even continuance of present levels of traffic handled by GBW. Under BN control, GBW would have to maintain service comparable to that now rendered.

Finally, and in the event the Commission should approve the counterproposal, despite its opposition, Consolidated consders it vital to its interests that the following conditions be imposed: (1) that Consolidated be granted on option to purchase, upon reasonable terms, the GBW line between Biron and Coyne Junction and be afforded trackage rights over GBW lines between Coyne Junction and its Wisconsin Rapids facilities, and (2) in the event it elects not to exercise that option, that approval of the three lines' proposal be conditioned upon Soo Line's grant of trackage rights to CNW and Milwaukee Road at a fair and reasonable charge to serve the facilities of Consolidated at Biron, with switching at Consolidated's Wisconsin Rapids and Biron facilities to be performed by one of the three serving carriers, with just and reasonable charges to be allocated among the carriers based upon car handlings.

Fort Howard Paper Company manufactures sanitary paper products at a facility in Green Bay, in which 2,700 people are employed. It uses waste paper as raw material for the manufacture of pulp, which is then converted into finished paper products. Approximately 22,000 carloads were originated or terminated at the facility in 1975. About two-thirds of these carloads were outbound and about one-third were inbound. The overwhelming volume of that traffic moved by rail. Its plant is served directly by CNW, and by GBW and Milwaukee Road through reciprocal switching arrangements.

Fort Howard is presently satisfied with the service rendered by these carriers. However, of the three, it believes that GBW has rendered the most consistently good service. It uses the entire length of the GBW both on inbound and outbound shipments. Overall, 85 percent of the outbound tonnage moves by rail, and approximately 40 percent of that total is handled by GBW. Of the 40 percent, slightly less than half moves westward on the GBW and is interchange with the BN at East Winona, and the remainder moves eastward on the GBW to the cross-lake ferries. Fort Howard uses the GBW and the cross-lake ferries because, in its experience, that routing provides the most convenient and expeditious service to eastern destinations.

Opposition of Fort Howard to the three lines' proposal is based upon belief that the latter would be detrimental to continuance of cross-lake ferry service and would aggravate the car supply situation by causing dispersal of the GBW car fleet.

Fort Howard is convinced that the service of each of the three carriers now serving Green Bay is necessary to its business. It allocates its traffic among the carriers, with each being able to depend upon its fair share provided good service and adequate car supply are furnished.

The *American Can Company* employs 1,100 individuals in manufacturing a variety of paper products and byproducts. This shipper has had outbound shipments of approximately 12,000 carloads annually. Inbound traffic is substantially less. Approximately 95 percent of the outbound traffic is routed by American Can. Its facility is served by CNW, Milwaukee Road and GBW. CNW handles 37 percent of the outbound carloads, Milwaukee Road 32 percent, and GBW 31 percent. Although American Can regularly uses the cross-lake ferry services at Kewaunee, a substantial volume of its outbound traffic moving to eastern destinations is routed via Chicago or by other all-land routes. The shipper indicated that routings other than cross-lake were used primarily to support local carriers (CNW and Milwaukee Road) and that use of the cross-lake ferries entails a rate penalty in certain situations.

American Can believes that adoption of the threelines' proposal would create a void in day-to-day rail service which, based on past performance, CNW and Milwaukee Road would be unable to fill. Under the three lines' proposal, GBW's equipment would be dispersed over the entire systems of the Soo Line, Milwaukee Road, and CNW, thereby aggravating car supply problems at Green Bay. Also, it doubts that those carriers would support the car-ferry service to the extent it is presently promoted by the GBW.

Procter and Gamble Company, of Cincinnati, distributes household paper products for Charmin Paper Products Company, a wholly owned subsidiary. Two Chairmin facilities, the East River plant and the Fox River plant, are located in Green Bay.

The East River plant is served by the GBW and Milwaukee Road. The Fox River plant is served by these carriers and the CNW. During 1975, both plants received or shipped in excess of 23,000 cars, with GBW handling approximately one-third, Milwaukee Road 23 percent, and CNW 44 percent of that total.

Large portions of this shipper's traffic move westward from Green Bay through Winona, utilizing the full extent of GBW's line. In addition, it has traffic moving eastward across Lake Michigan via the car ferries.

Traffic is allocated to the various carriers on the basis of car supply. On one occasion in 1975, BN supplied equipment at the shipper's request after Milwaukee Road, CNW, and GBW could not provide 50-foot boxcars. The shipper does not foresee a change in the car supply situation with BN controlling the GBW, but believes that approval of the application will preserve the present competition among the three carriers, which it deems essential to continued development of its Charmin division.

Champion International Corporation, of Stamford, Conn., manufactures and distributes lumber and paper products throughout the United States. It supports the BN application to ensure a joint-line connection with its company-owned railroad, the Ahnapee and Western Railway (A&W), which operates from the shipper's U.S. Plywood Division facility at Algoma to Casco Junction. In addition, shipper wants GBW to remain intact so that it can continue to serve as a bridge carrier in handling its transcontinental shipments.

A variety of decorative hardwood doors and architectural plywood panels is produced at Champion's plant in Algoma. Inbound shipments of raw materials move via cross-lake car ferry and GBW. In 1975, GBW participated in the movement of 406 carload shipments into or out of Algoma. In addition, GBW handles shipments of lumber and lumber products from the shipper's mills throughout the northwest. The GBW cross-lake interchange allows the shipper to minimize mileage and avoid the congested Chicago gateway.

Green Bay Packaging, Inc., is a manufacturer of corrugated shipping containers, folding cartons, and pulpboard, with plants in Green Bay and in Wausau, Wis. Its paper mill, corrugating plant, and warehouses in Green Bay are served by the GBW. In 1975, it routed over 1,000 carloads outbound and 1,200 carloads inbound via the GBW. Of these, 400 outbound carloads were routed via the Kewaunee car ferry and a substantial number of inbound carloads also moved over that route. Approximately 600 carloads move inbound annually from western origins, with GBW providing service from East Winona to Green Bay. Shipper opposes the three lines' proposal, believing that it will have a detrimental effect on cross-lake service and will disrupt present direct movements from the west.

Leicht Transfer & Storage Co. has 21 public warehouses and marine storage facilities in Green Bay. It specializes in the handling, storage, and import-export principally of finished paper products and, to a lesser extent, woodpulp and grain products. Its facilities are served by CNW, Milwaukee Road, and GBW either directly or through reciprocal switching. Shipper handles approximately 9,000 carloads a year, of which 6,700 move outbound to eastern or western destinations, and the remainder move to points in the south. Most of its traffic is routed by customers. Approximately 10 percent of its inbound traffic moves via the Kewaunee car ferry. Leicht has experienced difficulties in obtaining an adequate car supply, and that circumstances has weakened its competitive position vis-a-vis warehouses in Milwaukee and Chicago. While taking no position on the BN application, Leicht feels the three lines' proposal would, if implemented, further compound its car supply problem.

Bay West Paper Company's plant in Green Bay is served by Milwaukee Road and is open to the GBW, CNW, and Milwaukee Road through reciprocal switching. It ships approximately 3,000 outbound carloads annually. Of those, about 800 carloads are routed across Lake Michigan, 400 moving via GBW to Kewaunee and the remainder moving through the port of Milwaukee. It is pleased with GBW's service, especially its ability to provide expeditious transit both on eastward and westward movements.

The B&D Warehouse, Inc., stores paper products, pulp and woodpulp at Green Bay. From January 1975 through September 1976, 501 carloads terminated and 201 originated at the warehouse. About 60 percent of the inbound carloads moved by switch train from paper mills in Green Bay. The remainder carried raw materials from origins in Canada. B&D has received good service and car supply from GBW. In contrast, CNW often supplies cars with low door openings which hamper and delay loading, and cars supplied by Milwaukee Road are often unfit for loading due to their poor physical condition. Shipper's customers prefer to route their traffic via the cross-lake car ferries.

The *Green Bay Warehouses, Inc.*, deals in general merchandise and has a warehouse in Green Bay which it rents from GBW. The warehouse is used primarily for storage of woodpulp, finished sanitary papers, and oil and gas space heaters. During a 12-month period ending on September 30, 1976, it received 327 carloads, and it released 214 carloads for outbound movement. Approximately 10 percent of the inbound carloads were delivered by CNW, and the remainder were handled by GBW. Of the outbound carloads, 65 percent moved via GBW and the cross-lake ferries, and the remainder were transported by CNW via the Chicago gateway. Most of that traffic moved under routings specified by its main customer, American Can Company. The latter prefers the cross-lake ferry route in situations where rapid transit is important.

The *Amerhart Ltd. Company* is a lumber wholesaler in the process of relocating its operations in Green Bay to a site served by GBW. CNW, Milwaukee Road, and GBW, together moved a total of 1,100 carloads for this shipper in 1975. All were inbound shipments of lumber. While the majority of those shipments were handled by CNW, Amerhart has found that a BN-GBW routing provides the most expeditious service. It wants CNW and Milwaukee Road service to improve, but not at the expense of the GBW. Shipper began using cross-lake service in late 1975. As of late 1976, only 6 carloads had been received via the Kewaunee car ferry, but the shipper expects this volume will soon increase to between 20 and 25 carloads annually.

The Seymour Lumber Company, Inc., is a retailer of lumber in Seymour. It receives substantial quantities of umber from origins in the Pacific Northwest. Abandonment of western segments of the GBW pursuant to the three lines' proposal would eliminate the most direct and satisfactory rail route to Washington and Oregon. It fears that alternative rail routings through Green Bay would be highly circuitous, result in undue delays, and increase losses due to vandalism.

The Schiocton Lumber Company is a retail lumber and construction outlet located in Shiocton, a point on a portion of the GBW that would be abandoned under the three lines' proposal. In 1974 and 1975 it received a total of 43 carloads of lumber from the Pacific Northwest. During the first 9 months of 1976, another 15 carloads were received. Shipper considers trucking to be an impractical alternative because costs would be prohibitive.

FOOD AND RELATED PRODUCTS FIRMS

Green Bay Food Company produces various food products at a plant in Green Bay. It receives approximately 75 carloads of salt per year, primarily from points in Michigan. These are routed via the Kenwaunee car ferry and the GBW. Scheduling these shipments is important and shipper feels that delays resulting from routing through Chicago would present major production problems. In addition, it receives rail shipments of sugar, soybean oil, and corn syrup from western points, and glass bottles from Louisiana. It supports the BN application to assure continuance of GBW's good service.

Pauly Cheese Company, a division of Swift & Company, produces cheese at a facility in Green Bay. Approximately one-third of its outbound shipments move cross-lake through Kewaunee, and that service has been satisfactory. It supports the BN application in the expectation that it would result in greater availability of mechanical refrigerator cars. Shipper has found it much easier to work with GBW then CNW with regard to car supply matters.

L. D. Schreiber Cheese Co., Inc., also processes cheese and cheeese products in Green Bay. It serves chainstores and distributors in all 50 States and Canada. While most of its commercial traffic moves by motor carrier, it makes heavy use of rail service in fulfilling Government contracts. Many of those shipments move via Chicago in refrigerated equipment, and CNW is the principal carrier used. While characterizing CNW service as adequate, that carrier, at times, is unable to supply sufficient refrigerated equipment. Schreiber supports the BN application in the expectation that an additional supply of reefers will become available for use on eastbound movements via the car ferries. In the past, GBW has provided backup service when it has encountered car supply problems. Schreiber believes that the three lines' proposal would be detrimental to cross-lake traffic, since the three lines have not solicited such business in the past.

Larsen Company produces canned and frozen vegetables. It has seven canning plants in Wisconsin, five of which are served by CNW and two by Milwaukee Road. In Green Bay it has a distribution facility served by GBW. Larsen's transportation needs are greatest during the canning season, which extends from June through November and peaks in August and September. Its storage facilities are limited, and if rail cars are unavailable shipper is required to use motor transportation, thereby incurring higher costs. Inadequate car supply prompted the shipper to lease insulated, damage-free (DF) boxcars in March 1974. It now has 30 of these in service, 18 of which are utilized by its Green Bay plant on the GBW line. Canned vegetables are subject to freezing and condensation and must be transported in insulated equipment during the winter months and handled carefully at all times to avoid damage. During 1975, CNW handled approximately 770 of its outbound carloads, Milwaukee Road 10, and CNW moved 347. Of the latter number, 324 were handled in DF cars supplied by GBW; 250 were routed eastward via the car ferries; and the remainder were routed westward over the GBW to the gateway at East Winona. It supports the BN application to improve long-range car supply and to preserve cross-lake mileages for rate-making purposes.

Green Bay Canning Corporation processes fresh vegetables in Green Bay and is served by both the GBW and CNW. It ships to major grocery chains; and, in 1975, it routed 103 carloads of freight. Half the shipments were destined to eastern points and the remainder to western points. CNW handled 15 carloads and four in the first 2 1/2 months of 1976. The shipper has found CNW to be slow in furnishing equipment. GBW is its primary carrier, and it utilizes the entire length of GBW's line on westbound traffic. Its cross-lake traffic moves via GBW to Kewaunee.

The shipper is satisfied with the service provided by the GBW, particularly with its ability to provide damage-free cars on short notice. Transit time is especially important because it receives many short-notice orders from customers. It feels that the BN has the resources to continue to provide the quality service it presently receives from GBW.

Packerland Packing Company, Inc., of Green Bay, a beef slaughterhouse and processing company, and *A. Frankenthal & Sons, Inc.*, also of Green Bay, a beef processing and cold storage company, ship frozen ground beef under contracts with the U.S. Department of Agriculture. From July 1975 to July 1976, 350 to 400 carloads of frozen meat were shipped by rail, with USDA designating all of the routings. These shippers utilize the entire GBW line on westbound shipments, but most of their traffic moves to points east of the Mississippi River. They consider the cross-lake route essential to servicing eastern markets. GBW is the only carrier to actively solicit cross-lake business. CNW has consistently sought a long haul via Chicago. Recently, these shippers have encountered difficulty in obtaining mechanical refrigerated cars from CNW. BN has consistently supplied such cars via GBW when they are needed.

The Atlas Warehouse & Cold Storage Co. stores food products, primarily cheese in bulk packages, at Green Bay. Its warehouse is served by the GBW and CNW. GBW is its largest supplier of mechanical refrigerated cars, and those cars are owned by BN. Atlas does not believe that the existing level of service can be maintained under the three lines' proposal. It anticipates that the overall car supply would diminish because of loss of access to the BN car supply. It has consistently encountered problems in obtaining cars from CNW. Also, Atlas believes that implementation of the three lines' proposal would reduce the frequency of switching service. In addition, it fears that use of cross-lake ferry service would be discouraged.

Northland Cold Storage has four warehouses in Green Bay, and one is located on the Milwaukee Road's track. The warehouses primarily store frozen foods, particularly cheese. Shipper feels that any diminution of rail services available in Green Bay would jeopardize its ability to provide for the needs of its customers. While the predominant portion of traffic going in and out of its facilities moves by motor carrier, rail service has been needed and used, including service to and from the ferries at Kewaunee. During 1975, 58 carloads were shipped to or from its warehouse. Loss of that track would create inconvenience for customers who prefer rail service, since transportation to and from the nearest team track would result in delay and add to the risk of damage to perishable freight. Those shippers probably would transfer their business to warehouses of competitors in Green Bay served directly by rail.

The *Green Bay Soap Company* is an inedible renderer in Howard, a community located slightly west of Green Bay and served by GBW. It ships approximately 500 to 600 carloads annually, utilizing the entire GBW line, and expects that volume will increase to 700 to 725 cars in 1977. Approximately 25 percent of its traffic is destined to New York and New England points, 45 percent to points on the west coast, primarily Seattle, Wash., Portland, Oreg., and Oakland, Calif., and 30 percent to the gulf ports of New Orleans, La., and Houston, Tex. Traffic to the west coast is for export, as are the shipments to the gulf ports, and ship departure dates must be met. Shipper considers that the best route for west coast export movements is via the GBW-BN with interchange at East Winona. About 15 percent of its total shipments and the majority of the eastern shipments are routed via the Ann Arbor car ferry at Kewaunee. Shipper opposes the three lines' proposal in the belief it would cause service to deteriorate. It would be content if GBW could remain independent and maintain its present level of service. Fast service and car return are important because 40 percent of its traffic moves in leased jumbo tank cars costing $10 per car per day, and shipper has avoided routings through the Chicago gateway for that reason.

Seymour Canning Company operates a vegetable canning plant in Seymour. It receives inbound shipments of seed from the Pacific Northwest and inbound shipments of salt from Michigan. Approximately five carloads of salt per year arrive via the Kewaunee car ferry. Its principal outbound service is by truck. However, about 25 carloads move eastbound annually via the cross-lake car ferry. Shipper supports the BN application and opposes the three lines' proposal. Under the latter, it would be at the end of a branch line served by Milwaukee Road, and it characterizes that carrier's service as poor.

Bay State Milling Company of North Quincy, Mass., owns and operates flour mills at various points in the United States, including a mill in Winona, Minn. Grain from the upper Midwest is brought to Winona and processed into 13,000 hundredweights of flour and 4,000 undredweights of byproduct per day, the latter being used as a feed ingredient. Approximately 10 percent of this volume is shipped to eastern points, such as Detroit, Mich., and Buffalo, N.Y., via the GBW and the car ferry at Kewaunee. This route gives the shipper a consistent transit time and is faster and less circuitous than a routing through Chicago. While the GBW moves this freight to Kewaunee in a few hours, shipper has found that Milwaukee Road takes at least 2 days to reach Chicago. By supporting the BN application, Bay State expects incidentally to benefit from availability of BN's fleet, including air slide cars which the GBW cannot provide. Currently, the four carriers serving Winona contribute to an equipment pool which is committed to this shipper. Bay State supports the BN application and believes denial would raise serious questions concerning GBW's future viability.

Anthony Farms processes potatoes at a plant in Scandinavia. It is presently served by the GBW, whose siding is 300 feet from the plant. Shipments of potatoes from California totaled 44 carloads in 1974, 32 in 1975, and 56 during the first 9 months of 1976. Plans are underway to extend the spur to the plant, thereby to facilitate delivery. Presently all outbound shipments of potatoes move by truck, and extension of the rail siding would permit outbound shipments of potatoes by rail, thereby permitting shipper to reach distant eastern markets. Implementation of the three lines' proposal would eliminate rail service at Scandinavia and end any possibility of expanding sales in the East. Also, it would have to truck in shipments of potatoes from California, and this would increase costs.

La Crosse Milling Company processes whole grains into finished products for animal feed manufacturers and consumers at a plant located in Cochrane, Wis., 16 miles north of East Winona on the BN. It also processes oats for human consumption under contract with the USDA World Food Programs. Shipments move to points throughout the United States, and about 3,500 railcars are used annually, principally on outbound movements. In 1975, approximately 60 percent of its outbound carload traffic was handled by BN from Cochrane to East Winona and interlined with GBW for movement to Green Bay. This shipper fears that abandonment of portions of the GBW, as outlined in the three lines' proposal, will lead to increased freight rates on movements through the Chicago gateway.

A. Sturm & Sons, Inc., operates out of Manawa as a wholesaler of food and agricultural products and processor of dairy products (primarily packaged butter) for the commercial market and USDA. Under the counterproposal, it would be located at the end of a branch line served by CNW from New London. During 1975, shipper received 251 cars and forwarded 267. This represents a sizable decline in its carload totals for prior years, due to use of larger capacity cars and to fluctuations in the number of Government contracts it was able to obtain. Shipper regularly routes shipments over the western portion of GBW; but its primary use of that carrier is in connection with cross-lake traffic, with 171 cars moving outbound via Kewaunee and approximately 4 moving inbound during 1974. In the past, it has had difficulty obtaining an adequate supply of mechanical refrigerator cars from Soo Line, Milwaukee Road, and CNW. GBW has been able to obtain "reefers" from BN for shipper's use, and BN has permitted those cars to be routed eastbound as well as westward over GBW's line. The latter has provided good service, even to the point of running special trains to meet shipper's requirements. Shipper has not been advised as to how CNW proposes to serve Manawa, and fears that it will lose daily service and experience less rapid transit times under the three lines' proposal.

The *Shiocton Kraut Company* operates a food processing plant at Shiocton, a point which would be left without direct rail service under the counterproposal. Outbound shipments of canned sauerkraut totaled 43 carloads in 1974 and 24 carloads in 1975. Most of those shipments moved to the west coast. It receives about two carloads of salt per year and those move via ferry service through Kewaunee. Shipper characterizes the car supply and general service performance of GBW as superior, and it hopes that the present level of service will continue. Loss of rail service would effectively prevent its reaching west coast markets and would probably lead to sacrifice of its warehousing business in Arkansas.

CHEMICAL, PETROLEUM PRODUCTS, AND FERTILIZER SHIPPERS

BASF Wyandotte Corporation is a major producer of industrial chemicals. As pertinent, its major production facility is located at Wyandotte, Mich. It uses cross-lake routing (AA ferry, GBW, and various connections beyond, including BN, CNW, Soo Line, and Milwaukee Road) on approximately 250 carloads annually moving to points in Wisconsin, Minnesota, Upper Peninsula of Michigan, North and South Dakota, and the Pacific Northwest. A substantial portion of that traffic moves in 1,400 privately owned or leased tank cars (or in assigned rail equipment). Consistent expeditious round trip service is essential so that production schedules may be uninterrupted and the fleet size may be minimized. Overhead service on the GBW rarely exceeds 12 hours from Kewaunee to its rail connections at the western end of its line. This contrasts with long delays (over a week, in some instances) experienced when shipments to the same locations are routed through the Chicago gateway. Accordingly, this shipper supports the BN application as providing the best assurance for continuance of its most rapid and preferred transcontinental routing; and it opposes the three lines' proposal as destructive of that routing.

Farmers Co-Op Oil Company provides petroleum products and fertilizer, and operates feed mill and grain storage facilities for its 1,000 members at Hixton, a point on a portion of GBW's line for which abandonment authority is sought under the three lines' proposal. It recently has negotiated with GBW for construction of a rail siding to handle shipments (incoming from the west) to a new bulk fertilizer blending plant scheduled to open in May 1976. This facility will receive up to 50 carloads of fertilizer annually. Loss of direct rail service would force the shipper to employ trucks in moving fertilizer from Merrillan. Round trips of approximately 25 to 30 miles would be involved, as well as sharply increased costs to customers.

The *Waupaca County Highway Commission* opposes the three lines' proposal because rail service to its asphalt storage tanks at Ogdensburg would be subject to abandonment thereunder. Inbound shipments of asphalt move primarily by rail and require use of approximately 20 to 25 jumbo railcars (or 40 to 50 regular-sized cars) annually. It does not consider trucking to be a feasible alternative.

Terra Chemicals International Corporation serves about 800 farmers from its fertilizer distribution facility in Shiocton, also located on a segment of GBW's line for which abandonment authority is sought under the three lines' proposal. In 1975, it received about 62 carloads of fertilizer from its plant or warehouse in Iowa, and it expects that volume will increase to between 80 and 90 carloads in 1976. Truck service would entail higher costs which it would be required to absorb for competitive reasons. Also, shipper has distributed anhydrous ammonia directly from large tank cars during the peak fertilizer application season, and absence of rail service would require expansion of its storage facilities at Shiocton.

The *Seymour Cooperative Exchange* provides feed, fertilizer, and related products to farmers in the Seymour area. Most of its annual rail volume (86 to 92 cars) arrives via GBW from western origins, but some (15 to 21 cars) comes cross-lake from the East. It praises GBW service, wants it continued, and feels that the "spur line" to Seymour envisioned by the counterproposal would fall short of meeting its transportation needs.

METAL AND METAL PRODUCTS SHIPPERS

Betten Processing Company is a metal scrap dealer in the Green Bay area served by GBW, Milwaukee Road, and CNW. It ships and receives in excess of 1,000 carloads of scrap metal each year, purchasing from as far away as Montana and shipping as far as Utah in the west and New Jersy in the east. Betten uses all three rail carriers, and it feels that continued presence of the GBW is needed to assure rail competition at Green Bay. It has experienced rapid outbound service both to the East and West via GBW, and it characterizes that carrier's performance as outstanding.

Bahcall-Packerland Steel and Supply's facility in Green Bay is served exclusively by the GBW. It receives approximately five rail carloads of steel per week which it distributes locally. Most of its steel shipments come from Chicago and eastern points, and the remainder originates in Minnesota. Its primary carrier on movements from Chicago is CNW, which interlines to the GBW for delivery. Shipper is pleased with GBW's service over the years, and it does not foresee any change in its routing practices if the BN application is approved.

Aluminum Specialty Company manufactures kitchen appliances, pots, and children's toys. As pertinent, it opened a new plant at Seymour in 1973. Availability of GBW's daily service on outbound routings (both East and West) was a substantial factor in its selection of plant location. In 1975, 186 rail cars moved outbound, 35 percent of which moved cross-lake through the Kewaunee gateway. Shipper has found that cross-lake service is faster than routings via Chicago. The remainder of the shipper's traffic moves westward over the GBW to East Winona, where it is interlined to rail carriers serving the States of California, Texas, and Washington. Shipper strongly opposes the three lines' proposal as it would result in circuitous westbound service and probably less frequent service.

SHIPPERS AND REPRESENTATIVE BODIES LOCATED ON THE WESTERN PORTION OF GBW

Trempealeau County lies at the far western end of GBW's line, is a predominantly agricultural area, and includes within its borders the communities of Independence, Whitehall, Blair, and Hixton (all of which would lose direct rail service if the counterproposal were to be implemented fully), and Arcadia (which would be served by Milwaukee Road over a branch line extending from East Winona, under the counterproposal).

The *Trempealeau County Board of Supervisors* strongly opposes the counterproposal. In its view, GBW has provided good service over the years, and maintenance of its operations is deemed essential to the present and future economic well-being of the county. Essentially the same view was expressed by the *Trempealeau Electric Cooperative* and the *Trempealeau County Farm Bureau*. The latter represents about 200 active farmer members.

The *Arcadia Chamber of Commerce*, representing the local businesses and industry within the municipality of Arcadia, supports the BN application in order to maintain intact GBW's line to Green Bay and Kewaunee. Approximately nine shippers use the rail facilities at Arcadia, and, in 1974, they generated a total of 1,905 carloads of traffic. Arcadia is currently expanding in an easterly direction and has doubled its geographical size in the last 2 years. The Chamber of Commerce believes that continuance of GBW's service is essential to the maintenance and growth of industry in the area.

Arcadia Furniture Company began operations in 1970 and has grown rapidly since that time. It employs approximately 50 percent of the nonfarm labor force of Arcadia and makes extensive use of rail service. In 1975, it shipped 527 carloads, primarily to eastern locations, with 210 moving via the Kewaunee ferries. Shipper finds routing through Chicago less desirable than cross-lake service because of slower transit times. It plans to expand its facility at Arcadia in order to add wood laminating to its processing operations. It would then use rail service in moving between 120,000 and 140,000 pounds of wood per day from the west coast. The continued availability of daily rail transportation is vital to this plan; and, as the terminus of a branch line of Milwaukee Road (as contemplated by the counterproposal), shipper doubts that Arcadia would receive daily service.

Tempski Farm Supply, Inc., is a small agri-business enterprise in Arcadia which ships or receives between four and eight carloads annually. Loss of the GBW service would be a serious economic blow to its business and would greatly reduce prospects for future expansion.

A. G. Cooperative Creamery produces broiler-fryer chickens and natural cheese in Arcadia. It also manufactures fertilizer, and recently invested $75,000 in new production equipment. Most of its inbound rail shipments consist of fertilizer originating to the west of Arcadia, but some shipments originate in Florida and move inbound via cross-lake ferries. GBW has provided "outstanding" service, and the shipper supports the BN application in order to assure its continuance.

The *Whitehall Chamber of Commerce* and the *Mayor of Whitehall* are opposed to the three lines' proposal, believing that loss of rail service would result in an eventual economic decline of the community and would mean less income, fewer jobs, and poorer marketing conditions.

Whitehall Village Products is a milk processor with facilities in Whitehall. It relies on rail for movement of approximately 80 cars per year, a number of which are moved by GBW to Kewaunee for transshipment via the ferries. Use of motor service would increase its costs and also imperil its ability to fulfill a supply contract recently entered into (February 1976) with a major milk exporter, the *Erie-Cassein Company*. The latter concern anticipates routing 4 million pounds of product into Whitehall and 2 million pounds outbound on an annual basis, using rail service.

Tiffany Tie and Lumber Company manufactures lumber and railroad ties at Whitehall, shipping outbound approximately 100,000 ties annually by rail. This requires 20 railcars per month, each holding 40 to 80 tons. BN is the shipper's major customer. Use of 40 semitrailers would be required to haul the same volume of traffic, and would be a more costly operation.

Larson Building Materials receives carloads of lumber and building materials at Whitehall and, like Tiffany, it fears that if rail service was terminated, its costs would increase substantially if it had to use motor carrier service.

Whitehall Packing Company, Inc., also opposes the counterproposal. This meatpacker expects that a recently completed multimillion dollar expansion of its facilities in Whitehall will enable it to quadruple its production within 2 years. However, the extent of its past or anticipated future use of rail service is not of record.

The *city of Independence, Wis.*, and *Independence Lumber Company, Starwood Products Co.*, and *Anderson & Son Milling Co., Inc.*, all express their support for the BN application and their interest in retaining present levels of rail service at Independence. The *city of Blair* also favors continuance of GBW's service as necessary to its future industrial development. An Associated Milk Producers' plant is located in Blair, and its expansion plans call for erection of a $6 to $7 million cheese packaging facility. Also, its existing plant may need to convert to coal as an energy source, and conversion would be facilitated by retention of rail service.

SHIPPERS OPPOSING THE BN APPLICATION

As noted in the main body of this report, none of the shippers appearing in opposition to the BN application have facilities located on the line of GBW. Their concern is that GBW under BN control would be in a position to divert substantial volumes of traffic from the Soo Line, Milwaukee Road, or CNW, with consequent adverse effect upon the ability of those carriers to render adequate service. Testimony to that effect was given by:

Scott Paper Company, of Philadelphia, a major producer of paper products, which, as pertinent, has plants at Marinette, Wis. (served by Milwaukee Road) and at Oconto Falls, Wis. (served by the CNW). In 1975, these carriers handled a total of 36,000 carloads moving to or from those plants. Scott favors the counterproposal, believing that its implementation would go a long way toward rationalizing the "overbuilt" rail system in Wisconsin. Scott discontinued use of cross-lake ferry service 4 or 5 years ago after finding that rail service through Chicago provided more consistent transit times.

Flambeau Paper Company produces fine writing paper at a plant in Park Falls, Wis., served by Soo Line. In 1975, it routed approximately 2,809 cars via that carrier.

Bergstrom Paper Company manufactures printing paper at a plant in Neenah, Wis., served by Soo Line, and by Milwaukee Road and CNW through reciprocal switching. It uses about 5,000 railcars annually.

Wisconsin Tissue Mills produce paper and paper products at a facility in Menasha, Wis. Soo Line is its principal rail carrier, with Milwaukee Road and CNW providing backup service.

Presto Products, Inc., manufactures plastic bags and wrappers. The basic material in its products is plastic resin, which is transported in hopper cars in quantities of 150,000 to 200,000 pounds per car. Soo Line handles approximately 400 inbound and 50 outbound shipments per year and has provided "excellent" service.

APPENDIX E

Conditions for the benefit of GBW employees

ARTICLE I

1. *Definitions.*—Whenever used in this article, unless the context requires otherwise, the words and phrases defined in this paragraph shall be deemed and construed to have the meanings herein set forth.

(a) "Transaction" means the transaction or transactions approved by the report of which this appendix is a part.

(b) "Carrier" means the railroad or railroads which are involved in the transaction, as defined or described in the said report.

(c) "Displaced employee" means an employee of a carrier who is placed to a worse position with respect to his compensation and rules governing his working conditions as a result of the transaction.

(d) "Dismissed employee" means an employee of a carrier who, as a result of the transaction, is deprived of employment with the carrier because of the abolition of his job or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of the transaction.

(e) "Protective period" means that period of time from the date on which an employee is displaced or dismissed to the expiration of 4 years from the effective date of the order authorizing the transaction; provided, however, that the protective period for any particular employee shall not continue for a longer period following the effective date of said order than the period during which such employee was in the employ of the carrier prior to the effective date of the order.

2. *Displacement allowances.*—(a) So long after his displacement as he is unable, in the exercise of his seniority rights under existing agreements, rules, and practices, to obtain a position producing compensation equal to or exceeding the compensation he

received in the position from which he was displaced, during the protective period a displaced employee shall be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the monthly compensation received by him in the position from which he was displaced; provided, however, that if any employee elects not to exercise his seniority rights he shall be entitled to no allowance.

(b) Each displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction, thereby producing average monthly compensation and average monthly time paid for in the test period.

(c) If his compensation in his retained position in any month is less than the aforesaid average compensation, the displaced employee shall be paid the difference, less compensation at the rate of the position from which he was displaced for time lost on account of his voluntary absences in his current or retained position, but if in his retained position he works in any month in excess of the average monthly time paid for in the test period, he shall be compensated for the excess time at the rate of pay of the retained position.

(d) Nothing herein contained shall operate to affect in any respect the retirement on pension or annuity rights and privileges with respect to any employee.

3. *Dismissal allowances.*—(a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during the protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction.

(b) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the carriers, shall agree upon a procedure by which the carriers shall be currently informed of the wages earned by such employee in employment other than with the carriers, and of the benefits received.

(c) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the failure of the employee without good cause to return to service after being notified by the carriers of a position, the duties of which he is qualified to perform and for which he is eligible, or in the event of his resignation, death, retirement on pension, or dismissal for good cause.

4. *Fringe benefits.*—No employee of the carrier who is affected by the transaction shall be deprived during the protective period of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, relief, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees on his home road, in active service, or on furlough, as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

5. *Moving expenses.*—Any employee retained in the service of the carrier or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and within the protective period is required to move his place of residence, shall be

reimbursed for all expenses of moving his household and other personal effects, for the traveling expenses of himself and his immediate family, and for his own actual wage loss, not to exceed 2 days, the exact extent of the responsibility of the carrier to be agreed upon in advance by the carrier and the employee affected; provided, however, that changes in place of residence which are not a direct result of the transaction, made subsequent to the initial change and which grow out of the normal exercise of seniority, shall not be considered within the purview of this paragraph.

6. *Arbitration of disputes.*—In the event any dispute or controversy arises with respect to the protection afforded by these conditions or with respect to their interpretation, application, or enforcement, which cannot be settled by the carriers and the employee or his authorized representatives within 30 days after the dispute arises, it may be referred by either party to an arbitration committee for consideration and determination. Upon notice in writing served by one party on the other of intent by that party to refer the dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the arbitration committee and the two members thus chosen shall select a third member who shall serve as chairman. Should the two members be unable to agree upon the appointment of the third member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a third, or neutral, member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate the third member, which designation when made will be binding upon the parties. The decision of the majority of the arbitration committee shall be final, binding, and conclusive. The salaries and expenses of the third member shall be borne equally by the parties to the proceeding and all other expenses shall be paid to the party incurring them.

7. *Losses from home removal.*—(a) The following condition shall apply, to the extent it is applicable in each instance, to any employee who is retained in the service of any of the carriers (or who is later restored to service after being entitled to receive a dismissal allowance), who is required to change the point of his employment within the protective period as a result of the transaction and is therefore required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by his employing carrier for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of filing of the application or applications here involved so as to be unaffected by such filing. The employing carrier shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee is under a contract to purchase his home, the employing carrier shall protect him against loss to the extent of the fair value of any equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the employing carrier shall protect him from all loss and cost in securing the cancellation of his said lease.

(b) Changes in place of residence subsequent to an initial change caused by the consummation of the transaction and which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this condition.

(c) No claim for loss shall be paid under the provisions of this condition which is not presented within 1 year after the date the employee is required to move.

(d) Should a controversy arise with respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the representatives of the employees and the carrier on whose line the controversy arises and in the event they are unable to agree, the dispute or controversy may be referred by either party to a board of three competent real estate appraisers, selected in the following manner: One to be selected by the representatives of the employees and one by the carrier, and these two shall endeavor by agreement within 10 days after their appointment to select the third appraiser. A decision of a majority of the appraisers shall be required and said division shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

8. The protective conditions above inure to the benefit of all employees of the carrier, whether union or non-union employees and whether or not represented by BLE, UTU, or RLEA.

9. If at any time agreements are negotiated for employee protection, they shall be submitted to the Commission for approval.

APPENDIX F

DT&I traffic conditions

1. Upon consummation of control of the Green Bay and Western Railroad Company (GBW) by Burlington Northern Inc. (BN), the latter shall cause GBW to maintain and keep open all routes and channels of trade via existing junctions and gateways, unless and until otherwise authorized by the Commission.

2. BN shall cause GBW to continue its present neutrality of handling traffic so as to permit equal opportunity for service to and from all lines reaching the rails of GBW without discrimination as to route of movement of traffic, and without discrimination in the arrangement of schedules or otherwise.

3. The present traffic and operating relationships existing between GBW, on the one hand, and all lines connecting with its tracks, on the other, shall be continued insofar as such matters are within the control of GBW and BN.

4. BN shall cause GBW to accept, handle, and deliver all cars inbound and outbound, loaded and empty, without discrimination in promptness or frequency of service as between cars destined to or received from competing carriers, and irrespective of destination or route of movement.

5. BN shall not do anything to restrain or curtail the right of industries located on the line of GBW to route traffic over any or all existing routes and gateways.

6. Any person having an interest in the subject matter may at any future time make application for such modification in the above conditions, or any of them, as may be required in the public interest, and jurisdiction will be retained to reopen the proceeding on our own motion for the same purpose.

APPENDIX G

Traffic conditions proposed for imposition in BN proceeding

In addition to the DT&I conditions, various parties request that any approval of the BN application be made subject to other conditions, as follows:

By Soo Line—

1. Grant Soo Line trackage rights from Wisconsin Rapids to Biron, and to switch Biron as agent of Soo Line.

Soo Line considers that this condition will enable it to retain $215,574 of its diversion estimate. Also, it expects to net an additional $225,421 in line-haul revenue.

2. Grant Soo Line operating rights over the GBW between Stevens Point and Wisconsin Rapids and require GBW to abandon operations between Plover and Stevens Point.

This would enable Soo Line to abandon operations between Marshfield and Wisconsin Rapids, and enable it to retain another $439,261 of its diversion estimate. Also, since it would be the sole carrier serving Stevens Point, it stands to receive an additional $715,440 from traffic formerly handled by GBW.

3. Establish new joint through routes and rates with Soo Line, with fair and reasonable divisions, via new gateways at Minot, Bismarck, and Carrington, N. Dak., and at Detroit Lakes and Erskine, Minn., for the delivery of westbound traffic by the Soo Line to BN, and for delivery of eastbound traffic by BN to the Soo Line at said gateways.

This would give Soo Line a longer haul on traffic it now interchanges with BN at Minneapolis, and an estimated $572,660 in additional revenue. The new gateways would be available only at Soo Line's option, and not BN's.

4. Cancel all existing routes and rates, and prohibit publication of new routes and rates, which would establish East Winona as a junction and interchange point for traffic moving under through routes and rates between stations which are east of the Mississippi River and south of the Wisconsin-Illinois border and stations located on the GBW in Wisconsin east of the western switching limits of Wisconsin Rapids.

This is to expressly preclude joint-line movements which, as stated by BN, would not normally occur because of high circuity. It would enable Soo Line to retain $297,153 of its estimated loss through diversions.

Soo Line estimates that the above conditions will provide it with revenues amounting to $2,026,249.

By CNW—

1. Establish and maintain joint rates and through routes with CNW via Crawford, Nebr., on lumber originating at stations on the British Columbia Railway or the BN (including its subsidiaries as defined in rule 45 of BNI Standard Division Sheet No. 2), on the one hand, to all destinations in the State of Wisconsin and to all destinations in official territory east of the Illinois-Indiana State line, utilizing established divisions as contained in items 5 through 15 of BN Standard Division Sheet No. 2, except where prescribed. Estimated value by and to CNW: $66,172.

2. Establish and maintain joint rates and through routes with CNW via Fremont or Omaha, Nebr., Council Bluffs, Iowa, Oakes, N. Dak., and Minneapolis-St. Paul, Minn., on coal, including lignite, originating at stations on the BN in Montana, North Dakota, and Wyoming, on the one hand, and destined to stations (except local BN stations)

east and south thereof, including stations in Oklahoma, Kansas, and Texas; divisions will be based on a current first-class prorate, except where prescribed divisions are applicable. Estimated value: $0 (nil).

3. On traffic interchanged between BN and CNW at Minneapolis, Minnesota Transfer, or St. Paul and moving between origins and destinations named in items 20 through 60 of BN Standard Division Sheet No. 2, CNW shall receive Oakes, N. Dak., dvisions as shown in said items, except where divisions prescribed by the Commission are applicable to such movements. Estimated value: $500,000.

4. BN shall add and thereafter maintain in the "And" column of the items 20 and 25 of BN Standard Division Sheet No. 2 the Province of Saskatchewan, Canada. Estimated value: $0 (nil).

5. All conditions imposed or stipulations agreed to for the protection of the GBW and the Kewaunee Green Bay and Western Railroad in *Chicago & N.W. Ry. Co.—Merger*, appendix VIII, 330 I.C.C. 13, 97, be vacated. Estimated value: $0 (nil).

6. BN and GBW shall maintain and keep open all routes and channels of trade via existing junctions and gateways, unless otherwise agreed upon by the carriers affected or directed by the Commission. For purposes of this condition, it shall be immaterial whether the previous movement occurred on class rates, commodity rates, or any other type of rate by whatever name it is described. It shall also be immaterial how the previous movement was packaged or whether it moved in bulk, what type of equipment was used to transport it, whether the commodities in question was precisely the same or a lower grade of the same basic commodity, or whether the previous or subsequent movements occurred in less-than-carload, multiple-carload, so-called trainload, unit train, or in any other volume quantity by whatever name said movement shall be known, it being the intent of this condition to maintain the commercial flow of commodities, without regard to the form of the movement or the name applied to it. In all movements protected by this condition, divisions to be applied shall be those which were applicable on the last previous movement prior to consummation. It shall be no defense to the BN or GBW for failure to comply with this condition that the granting of joint-line rates at existing divisions at the same level as a family line rate will produce earnings to the family lines or any portion thereof which are lower than desired or which are alleged to be noncompensatory. Estimated value: $0 (nil).

7. Consolidated Papers, Inc., at Biron shall be treated, on interstate movements, as being within the switching limits of Wisconsin Rapids, Wis., at a reciprocal switching charge not exceeding that applicable to intrastate movements. Estimated value: $205,000.

8. BN shall join with CNW to establish and thereafter to maintain:

a. Competitive joint export and domestic rates and routes via Shobon, Wyo., on whole grains, grain products, oilseeds, and the products thereof from stations served by the CNW, on the one hand, to station on the BN and its connecting carriers in TCFB North Pacific Coast Territory, on the other.

b. Competitive joint rates and routes via Shobon, Wyo., on whole grains, grain products, oilseeds, and products thereof between BN WTL stations in Montana and Wyoming, on the one hand, and CNW stations, on the other. WTL D/S 7700-A shall be applied to obtain divisions east and west of the Missouri River crossings in Iowa and Nebraska, and subdivisions west of the Missouri River shall be based on a mileage prorate, minimum twenty-five percent (25%) to the short line. Estimated value: $130,000.

9. Grant trackage rights to CNW between Council Bluffs, Iowa, and Kansas City, Mo., via Pacific Junction, Iowa, and St. Joseph, Mo., a distance of approximately 191 miles, at a fixed rate of $3 per train-mile. Estimated value: $1,521,872.

10. Revise a certain trackage rights agreement between CGW (CNW) and CB&Q (BN), dated August 3, 1944, for use of CNW trackage between Burch (Des Moines) and Talmage, Iowa, a distance of approximately 51 miles, to provide for a fixed rate of $3 per train-mile. Estimated value: $0 (nil).

11. a. Cancel a certain trackage right agreement dated April 29, 1944, between CNW and CB&Q (BN) for use of BN's tracks between Illco and Shobon, Wyo., a distance of 86.96 miles.

b. Grant trackage rights to CNW between Illco and Shobon, Wyo., a distance of 86.96 miles, at a fixed rate of $3 per train-mile. Estimated value of both: $109,563.

Total estimated value by and to CNW of imposition of above conditions: $2,532,607.

By Milwaukee Road—

1. Allow reciprocal switching privileges to Milwaukee Road at Wisconsin Rapids for account of Consolidated Papers, Inc., Biron, Wisconsin plant on interstate traffic as now applies on intrastate traffic and at a charge no higher than that applicable to intrstate movements.

2. An alternative to Condition No. 1: Grant trackage rights at a fair and reasonable charge to allow Milwaukee Road to deliver and receive their line haul carloads, also deliver and receive empties, at Consolidated Papers, Inc., Biron plant.

3. Grant trackage rights to Milwaukee Road, if they so desire, at a fair and reasonable charge, for operating purposes to allow movement of line haul loads and empties between Wisconsin Rapids and the station of Plover, Wis., for delivery to and receipt from the GB&W at that station with reciprocal switching privileges arranged and mutually agreed to.

4. That no unit train or multiple carload rates will be established to or from Milwaukee-GB&W Common stations excluding Milwaukee's right to participate in the routing with fair and reasonable divisions of revenue.

5. That any industries locating on GB&W in the future at Milwaukee-GB&W Common points will be granted reciprocal switching privileges at a fair and reasonable charge.

Milwaukee Road did not provide any estimate of the value to it of the above conditions.

By Consolidated Papers, Inc.— .

If control of the GBW is granted to the BN, Consolidated requests the following conditions:

1. Grant trackage rights to the CNW, Soo Line, and Milwaukee Road, at fair and reasonable charges, to serve facilities of Consolidated at Biron.

2. Switching at Consolidated facilities at Wisconsin Rapids and Biron shall be performed by one of the four serving carriers, i.e., GBW (controlled by BN), CNW, Soo Line, or Milwaukee Road. Reasonable and just charges for such services should be allocated among the carriers based upon car handlings.

3. The GBW under BN control shall grant trackage rights to the Soo Line, over GBW lines, between Wisconsin Rapids and Stevens Point.

4. BN cars shall not be subject to car service rules while on the GBW but shall be subject to routing in all directions via all presently available routes.

Though Consolidated opposes the three lines proposal, if any reason or circumstance develops which would cause the Commission to approve the three lines' proposal, Consolidated believes that the following conditions are an absolute minimum necessity to protect Consolidated's position:

1. Approval of the transaction to be subject to the right of Consolidated at its option and upon reasonable terms to purchase the GBW line between Biron and Coyne Junction, and to be afforded trackage rights over GBW lines between Coyne Junction and Consolidated's Wisconsin Rapids facilities.
2. As an alternative, applicable in the event that Consolidated does not exercise the option provided next above, approval of the transaction be conditioned upon the Soo's grant of trackage rights to CNW and Milwaukee, at fair and reasonable charges, to serve facilities of Consolidated at Biron, with switching at Consolidated's facilities at Wisconsin Rapids and Biron to be performed by one of the three serving carriers, with reasonable and just charges for such services to be allocated among the carriers based on car handlings.

By the Public Service Commission of Wisconsin—

The PSC supports imposition of Soo Line's conditions 1 and (except for the requirement that GBW abandon operations between Plover and Stevens Point) 2; CNW's conditions 1, 3, and 7; Milwaukee Road's conditions 1, 2, 3, and 4; Consolidated Papers' conditions 2 and 3; and the rate equalization condition proposed by Great Lakes Seaway Users.

By the Wisconsin Department of Transportation—

WISDOT supports imposition of Soo Line's conditions 1 and (subject to the qualification indicated by the PSC) 2; CNW's condition 7; all of Milwaukee Road's conditions; Consolidated Papers' conditions 1 through 3; and a condition similar to that proposed by Great Lakes Seaway Users. In addition, WISDOT proposes three more conditions. These are:

1. Require the GBW to file with the Commission and WISDOT a detailed "Quarterly and Annual Traffic Analysis" as per a form attached to its brief. (Substantially more information would be required thereunder than is contained in Quarterly Commodity Statistics (QCS) reports now required by the Commission.)
2. Prohibit BN and GBW from "issuing routes with circuity greater than 150 percent of the route operated by the present ratemaking carrier for that route."
3. Open upon all industries in Green Bay to reciprocal switching.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D.C., on the 8th day of July 1977.

FINANCE DOCKET NO. 27770

BURLINGTON NORTHERN INC.—CONTROL THROUGH ACQUISITION OF SECURITIES OF—GREEN BAY AND WESTERN RAILROAD COMPANY

FINANCE DOCKET NO. 28143

SOO LINE RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; AND CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—CONTROL—GREEN BAY AND WESTERN RAILROAD COMPANY AND ACQUISITION OF TRACKAGE RIGHTS—BY THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY IN THE CITY OF GREEN BAY, WISCONSIN

DOCKET NOS. AB-57 (SUB-NO. 3), AB-7 (SUB-NO. 28), AND AB-1 (SUB-NO. 55)

SOO LINE RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; AND CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—ABANDONMENT BETWEEN—(A) ARCADIA AND WISCONSIN RAPIDS, IN TREMPEALEAU, JACKSON AND WOOD COUNTIES (B) PLOVER AND MANAWA, IN PORTAGE AND WAUPACA COUNTIES (C) NEW LONDON AND SEYMOUR, IN OUTAGAMIE COUNTY AND (D) GREEN BAY, BROWN COUNTY, WISCONSIN

Upon consideration of the matters and things involved in these proceedings, and the said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions of law thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the applications in F.D. No. 28143, and in docket Nos. AB-57 (Sub-No. 3), AB-7 (Sub-No. 28), and AB-1 (Sub-No. 55) be, and they are hereby, denied;

It is further ordered, That the transaction embraced in F.D. No. 27770, subject to the terms and conditions referred to in the accompanying report, be, and it is hereby, approved and authorized;

It is further ordered, That jurisdiction is expressly reserved by this Commission to receive such petitions, institute such investigations and issue such orders to accomplish the objectives and purposes of the conditions prescribed herein, and this reservation of jurisdiction is in addition to those orders which may be issued under the provisions of section 5(10) of the Interstate Commerce Act which are deemed necessary or appropriate to supplement this order.

It is further ordered, That, in the absence of a stay or postponement by the Commission or the timely filing of an appeal, this order shall be effective 30 days from the date of service hereof.

And it is further ordered, That if the authority granted herein is not exercised within 1 year from the effective date hereof, or such further time as may be fixed by the Commission, it shall be of no further force and effect.

EX PARTE NO. 274 (SUB-NO. 2)

ABANDONMENT OF RAILROAD LINES AND DISCONTINUANCE OF SERVICE

Regulations issued November 1, 1976, to implement section 1a of the Interstate Commerce Act, relating to the abandonment of rail lines and the discontinuance of service (41 F.R. 48520 (1976)), as amended at 42 F.R. 25327 (1977) (to be codified at 49 CFR 1121), further considered, explained, and amended in part.

Appearances as previously shown, and

C. Harold Peterson for the Soo Line Railroad Company.

Howard D. Koontz for the Illinois Central Gulf Railroad Company.

Stuart F. Gassner for the Chicago and North Western Transportation Company.

REPORT OF THE COMMISSION ON FURTHER CONSIDERATION

BY THE COMMISSION:

We are reopening this proceeding on our own motion, pursuant to section 17(9)(g) of the Interstate Commerce Act (act). The ICC *Abandonment of Railroad Lines and Discontinuance of Service*, 41 F.R. 48520 (1976), as amended at 42 F.R. 25327 (1977) and 43 F.R. 7623 (1978) (to be codified in 49 CFR 1121) (regulations) have been in effect for over 1 year. We believe that at this time we have sufficient experience with the regulations to make certain minor changes for consistency, and ease of processing. We reconsidered and amended the regulations in a report on April 21, 1977. At this time, we also find it appropriate to consider the petitions and replies filed in this proceeding.

Pleadings have been filed by the Soo Line Railroad Company (Soo Line), the Illinois Central Gulf Railroad Company (ICG), the National Industrial Traffic League (NITL), the Family Lines, the Chicago and North Western Transportation Company (CNW), and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee Road).

Our discussion of the regulations will be limited to those provisions which have either been challenged by one of the parties or which have been determined, on our own initiative, to require some modification or clarification.

SECTION 1121.20(b)(5)—CATEGORY 5

Our review of the regulations indicates a minor discrepancy between section 1a(5)(a) of the act, and the definition of category 5. The act requires a full and complete diagram of the transportation system operated, directly or indirectly, by a carrier. Category 5 includes all other lines or portions of lines which the carrier owns, *and* operates, directly or indirectly (emphasis added).

A possible misinterpretation could arise from the use of the word "and" in defining category 5. Such misinterpretation could result in a carrier's omitting a line of railroad over which it operates pursuant to a trackage rights agreement from its system diagram map. In order to avoid possible confusion, we will modify category 5 by replacing the word "and" with "or". Section 1121.20(b)(5) of the regulation will be amended accordingly.

SECTION 1121.23(a)—NOTIFICATION REQUIREMENTS FOR AMENDMENT OF THE SYSTEM DIAGRAM MAP

The Soo Line believes section 1121.23(a) of the regulations requires a railroad to duplicate the entire posting, publishing, and service requirements set forth in section 1121.22 of the regulations every time it makes even the slightest amendment to its system diagram map (SDM). Soo Line explains that its interpretation of the regulations would require it, if it amended its SDM with respect to a 5-mile line in North Dakota, to serve notice on the Governors, public service commissions, and designated State agencies not only in the State of North Dakota, but also in South Dakota, Montana, Minnesota, Wisconsin, Illinois, and Michigan. Soo Line believes it would be required to republish notices in 21 newspapers located in five States, and taking approximately 10 man-days to repost notices throughout much of its system. Soo Line does not believe duplication of its initial notification effort is warranted by every minor amendment to its SDM.

ICG points out that it cost $7,750.80 to meet the publishing requirements for its initial SDM in 88 counties in 10 States. The belief of ICG is that an amendment to its SDM would require it to go through the entire notification, publication, and posting requirements for its entire SDM. Further, ICG points out that railroads may be reluctant to amend their SDM's other than annually or 4 months prior to the anticipated filing of an abandonment application. ICG contends that only the amendment to the SDM need be posted in the stations on the affected line, published in counties containing the line, and served on the proper officials in the State in which the amendment takes place.

The Family Lines, generally the Seaboard Coast Line Railroad Company (SCL) and the Louisville and Nashville Railroad Company (L&N), filed a petition supporting the position of the Soo Line. SCL served copies of their SDM on the proper officials of six States, published notices in 42 newspapers at a cost of $6,300, and posted notices in 100 locations. L&N served the SDM on the proper officials of 13 States, published notices in 35 newspapers at a cost of $2,230, and posted notices at 26 locations. The Family Lines aver that the notice, publishing and posting requirements necessary to amend the SDM, as described by Soo Line, are unreasonable, unnecessary, and uneconomical. The Family Lines submit that a more economic and pragmatic procedure regarding amendments to the SDM would be to post, publish, and serve notices of the amendment only in the State and county where the line affected by the amendment is located. Hence, Family Lines contends that posting and publishing should be limited to the affected stations and a newspaper of general circulation in the affected county.

CNW submits that it posted notices in 300 stations, published in almost 120 newspapers costing over $20,000, and served proper officials in 11 States. CNW believes that a balance must be struck between the cost of informing the public and the information needed by the public. It urges acceptance of the relief sought by the Soo Line and the Family Lines.

The Milwaukee Road points out that notices were posted in a large number of stations and published in nearly 175 newspapers costing in excess of $5,000. The SDM was served on the proper officials of 16 States. Milwaukee Road adopts the position of the Soo Line and the Family Lines, and requests a balance between the costs involved and the information needed.

NITL does not object to modification of the posting, publishing, and notice requirements for amending the SDM suggested by the Soo Line so long as the Commission insures that the interests of the shipping public are fully protected. They believe all unnecessary, duplicative, or otherwise unduly burdensome reporting, publication, and posting requirements are not in the public interest and should be deleted. However, NITL is concerned by the possible fragmentation of the advance notice procedures causing a party interested in the total system abandonment plans of a railroad to lose sight of the overall picture. To alleviate this problem, NITL proposes that amendments to the SDM be published in the Federal Register, and copies of the amended maps be furnished to parties who previously requested copies of the prior SDM.

Our purpose in establishing requirements for the posting, publishing, and filing of amendments to the SDM was to maintain the accuracy of the map. See section 1a(5)(a) of the act. In our notice of proposed rulemaking and order, 40 F.R. 31878 (July 30, 1976), we stated that "carriers may amend their system diagrams at any time *** if any change has occurred in the categorization of lines as listed in the most recently filed diagram." *Id.*, at 31880. It was not our intent to stifle amendment of the SDM through excessive notification procedures.

In order to refine the requirements of sections 1121.22 and 1121.23 of the regulations, we must first consider those persons interested in a carrier's amendment of its SDM. As NITL points out, there are certain national groups with such interest. State governments are interested in amendments to SDM's that occur in their States. We also believe States need an up-to-date SDM to judge the effects of any amendment on their State. Finally, those persons in the localities in which the amendment to the SDM is made should be given notice.

We envision the following scenario where an amendment is made to a SDM. The carrier shall file with the Commission six color-coded maps, and a black-and-white map suitable for publication in the Federal Register, along with line descriptions for those lines which have been amended since the last diagram map was filed. A copy of the color-coded map and accompanying line descriptions shall also be served on the Governor, public service commission (or equivalent agency) and designated State agency in each State within which the carrier operates or owns a line of railroad. Finally, the carrier shall publish in a newspaper of general circulation in each county within which an amended line is located, a notice containing a black-and-white copy of the SDM (or a portion of the map clearly depicting its lines in such county) and a description of each line, and shall post a copy of the newspaper notice in each agency station and terminal along the amended line or, if there is no agency station on the line, at any station through which business for the line is received or forwarded.

We believe that this method of notice of amendment of the SDM balances the need of affected persons to know of amendments and the burden on carriers of providing notice of an amendment to the SDM. Our regulations will be amended accordingly to reflect these filing, posting, and publishing requirements for amendments of an SDM.

SECTION 1121.32(a)(7)—REFERENCE TO INCLUSION ON THE SYSTEM DIAGRAM MAP

This section creates an internal inconsistency in the regulations between itself, section 1121.20(b)(1), section 1121.23(d) and section 1121.31. All of these sections are related to section 1a(5)(b) of the act which precludes the Commission from issuing a certificate of abandonment or discontinuance if the abandonment or discontinuance application is opposed by a significant user, a State, or a political subdivision of a State unless the line involved is identified and described on the SDM for at least 4 months prior to the filing of such application. Section 1121.23(d) of the regulations deems the 4-month minimum notice to commence only for a line or portion of a line designated in category 1. Section 1121.20(b)(1) of the regulations defines category 1 as all lines or portions of lines which the carrier anticipates will be the subject of an abandonment or discontinuance application to be filed within the 3-year period following the date upon which the diagram is filed with the Commission. The notice provision of section 1121.31 of the regulations requires the carrier to give the date on which the line first appeared in category 1. Finally, section 1121.32(a)(7) requires the application to contain a statement as to the date on which the line was first listed on the SDM as potentially subject to abandonment. This requirement is inconsistent with the information required in sections 1121.20(b)(1) and 1121.31.

The reference to "potentially subject to abandonment" in section 1121.32(a)(7) of the regulations is inconsistent and will be replaced with a reference to category 1. The regulations will be amended accordingly.

SECTION 1121.32(d)—BASE YEAR AND CALENDAR YEAR INFORMATION

Soo Line questions the necessity of the information required in both section 1121.32(d)(2) and 1121.32(d)(4) of the regulations. Section 1121.32(d)(2) of the regulations requires the same computation as made in section 1121.32(d)(1) be made for the 2 years immediately preceding the base year. The effect of the proposed abandonment or discontinuance on net railway operating income is required for the 2 calendar years immediately preceding the filing of the application and for that part of the current year for which information is available by section 1121.32(d)(4).

Soo Line contends that for applications filed on or after July 1 of any year, the railroad is required to file 5 years—base year, 2 years immediately prior to the base year, and 2 calendar years—of financial data, much of it duplicative. Soo Line states that it will be hard pressed to file the required cost and revenue data because of personnel constraints, and that it will have to delay filing any application proposing abandonment.

For these reasons, Soo Line requests that section 1121.32(d)(4) of the regulations be eliminated, and section 1121.32(d)(2) be amended to require information for the 2 calendar years immediately preceding the filing of the application.

The Family Lines agree with the recommendation of the Soo Line with regard to section 1121.32(d) of the regulations. They state that the information required by this regulation is duplicative, overlapping, confusing, unnecessary, and wasteful in terms of time and expense. Family Lines believes that adoption of Soo Line's recommendation would reduce the cost accountant's burden, allow the carrier to readily begin the filing of applications, and give the Commission all the cost-revenue information it needs to determine the issue of public convenience and necessity.

ICG also supports the position of the Soo Line. They point out that requiring data to be supplied on both fiscal year and calendar year bases is burdensome to the railroad and in many instances duplicative.

The Milwaukee Road and CNW adopt the Soo Line's proposal and support it.

Our objective in requiring the revenue and cost data in section 1121.32(d) was to obtain a concise, up-to-date picture of the financial condition of the line proposed for abandonment, and its effect upon the railroad. The proposal by the railroads will meet this goal. Therefore, we will continue to require revenue and cost data for the base year.

One of the criteria for determining public convenience and necessity is the effect of the net income or loss from the line proposed for abandonment on the overall system. The railroad's accounting for its entire system is on a calendar basis. In order to permit this comparison, we will amend section 1121.32(d)(2) to require data to be collected for the 2 calendar years immediately preceding the filing of the application and for that part of the current year for which information is available.

This will ease the burden cited by the railroads, and eliminate gathering such duplicative data. We will also be able to discern the financial effect of the line proposed to be abandoned on the entire system. The regulations will be accordingly amended.

SECTION 1121.33(a)—INFORMATION REQUIRED BY THE SUMMARY APPLICATION

Soo Line requests that the information for estimated subsidy payment (see section 1121.32(d)(3) of the regulations) not be required in the summary application. Soo Line submits that this information is very time consuming to prepare, and serves no useful purpose in a summary application because no substantial or material opposition is anticipated. Soo Line expresses a willingness to prepare the data after the application is filed, in the event an interested party is considering an offer of financial assistance.

The Family Lines, CNW, and the Milwaukee Road agree with and support Soo Line's contentions.

The NITL takes the position that the Soo Line's petition in this matter is without merit and should be denied. They point out that section 1121.33 of the regulations permits a carrier to file a summary application without certain detailed exhibits, but provides the Commission sufficient evidence to make an informed decision on the merits. NITL argues that the summary application provisions also enable the shipping public to be fully apprised of the nature of the application. NITL contends that the burden of providing section 1121.32(d)(3) information is not an onerous burden in the summary application. Further NITL believes that all abandonment applications should be based on sound economic data, of which an estimated subsidy is a part. Finally, NITL states that the estimated subsidy information is needed prior to the time written comments and petitions to investigate are filed, since interested parties may rely on the information contained in a copy of the application, and in order for interested parties to make an offer of financial assistance which is reasonable.

We dealt with the question of requiring the information in section 1121.32(d)(3) of the regulations, in the application in our November 10, 1977, report, *id.*, at page 24. There it was said that:

> We think it essential, if the Commission is to obtain accurate information concerning the profit or loss which resulted in operating the line, to require the carrier to provide us with a computation of the avoidable costs, revenues attributable, and reasonable return on the value of the line which is the subject of the application, as these terms

> are defined in subpart D of the regulations. Having made these computations, we fail to see why the further computation of an estimated subsidy payment should pose any problem whatsoever to the applicant.

We reiterate this position at this time.

Not only is the information relating to estimated subsidy necessary for our decision, but it is also necessary for those persons considering offers of financial assistance. Simply because a proposed abandonment is not opposed does not mean no one is interested in offering financial assistance. The lack of opposition to a proposed abandonment may be a means of expediting the proceeding so that financial assistance offers can be made in the near future with the offering party taking over operation of the line before its physical condition further decays.

We will not amend section 1121.33(a) of the regulations requiring information regarding the estimated subsidy calculation contained in section 1121.32(d)(3) of the regulations.

FINDINGS

The appendix sets forth the revisions to the regulations, incorporating all the changes referred to in this report.

We find that the revisions are reasonable and necessary and that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered:

1. The revisions to the regulations as set forth in the appendix are adopted.

2. Except as herein revised, modified, supplemented, or amended, the regulations and accompanying reports and orders decided October 29, 1976, and April 21, 1977, in this proceeding, shall remain in full force and effect.

3. Notice of this order shall be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing a copy with the Director, Office of the Federal Register.

4. This order shall become effective on the date it is served.

Decided May 4, 1978.

APPENDIX

Revisions

Section 1121.20(b)(5) is revised as follows:

(b)(5) All other lines or portions of lines which the carrier owns or operates, directly or indirectly.

Section 1121.22 is revised as follows:

(a) Each carrier shall file with the Commission six copies of its color-coded system diagram map (identified by its "AB number" as set forth in appendix B hereto) and of the accompanying line descriptions. When an amended map is filed, the line descriptions for the lines which were amended must be filed. The initial system diagram map and descriptions shall be filed within 180 days after the effective date of these regulations.

(b) The color-coded system diagram map, any amendments of the map, and accompanying line descriptions shall be served upon the Governor, the public service commission (or equivalent agency) and the designated State agency of each State within which the carrier operates or owns a line of railroad.

(c) The Commission shall publish a black-and-white version of the initial and each amended system diagram map as submitted in accordance with section 1121.20(d) and accompanying line descriptions in the Federal Register. The carrier shall (i) publish in a newspaper of general circulation in each county within which is located a line in categories 1 through 3 (section 1121.20(b)(1)-(3)) or a line which has been amended, a notice containing a black-and-white copy of the system diagram map (or a portion of a map clearly depicting its lines in such county) and a description of each such line; (ii) post a copy of the newspaper notice in each agency station or terminal on each line in categories 1 through 3 (section 1121.20(b)(1)-(3)) or on each line which has been amended or, if there is no agency station on the line, at any station through which business for the line is received or forwarded; and (iii) furnish, at reasonable cost, upon request of any interested person a copy of its color-coded or black-and-white system diagram map and the publication in the county newspaper shall so indicate.

(d) Each carrier shall file with the Commission an affidavit of service and publication stating the date each was accomplished. A copy of each newspaper notice published shall be attached to the affidavit. The effective date of the filing of the initial system diagram map and each amended system diagram map as required in paragraph (a) of this section shall be deemed to be the date upon which the Commission receives the affidavit required in this paragraph.

(e) The Commission shall require republication of the notice if it is found to be inadequate.

Section 1121.23(a) is revised as follows:

(a) Each carrier shall be responsible for maintaing the continuing accuracy of its system diagram map and the accompanying line descriptions. Each carrier shall also prepare and submit to the Commission a black and white version of the system diagram map and accompanying line descriptions which clearly identify each of these categories of line and are suitable for publication in the Federal Register, in accordance with appendix A. Amendments may be filed at any time and will be subject to all carrier filing and publication requirements of section 1121.22 as they apply to the amendment and each individual line which has been amended.

Section 1121.23(c)(1) is revised as follows:

(c) Each carrier shall file with the Commission, at the time it files its annual report required by part 1241 of this title:

(1) An amended and updated color-coded and black and white system diagram map and line descriptions which shall be subject to the filing and publication requirements of section 1121.22 as they apply to the amendment and each individual line which has been amended; or ***.

Section 1121.32(a)(7) is revised as follows:

(7) Reference to inclusion of the rail line to be abandoned or over which service is to be discontinued on the carrier's system diagram map, in compliance with section 1121.20-.23, and the date upon which such line was first listed on the system diagram map in category 1 in accordance with section 1121.20(b)(1). A copy of the line description which accompanies the system diagram map shall also be submitted.

Section 1121.32(d)(2) is revised as follows:

(2) The same computation shall be made for the 2 calendar years immediately preceding the filing of the application and for that part of the current year for which information is available using data collected at the branch level to the extent available and otherwise allocating system revenues and expenses to the line. The bases for any such allocation shall be stated with particularity.

FINANCE DOCKET NO. 28533

MINNESOTA TRANSFER RAILWAY COMPANY ORDERED TO PROVIDE SERVICES, TRACKS AND FACILITIES FOR THE OPERATIONS OF TRAINS OF THE NATIONAL RAILROAD PASSENGER CORPORATION AND THE ESTABLISHMENT OF JUST AND REASONABLE COMPENSATION FOR SUCH SERVICES, TRACKS AND FACILITIES

Decided May 4, 1978

Compensation set, pursuant to section 402(a) of the Rail Passenger Service Act, for the use of tracks, facilities, and services of the Minnesota Transfer Railway Company.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS BROWN, GRESHAM, AND CHRISTIAN

BY THE DIVISION:

In this proceeding we are asked to establish just and reasonable compensation, pursuant to section 402(a) of the Rail Passenger Service Act (RPSA), 45 U.S.C. 562(a), for the services and the use of tracks and facilities provided to the National Railroad Passenger Corporation (Amtrak) by the Minnesota Transfer Railway Company (MTRC).

INTRODUCTION

On August 19, 1977, Amtrak filed an application under section 402(a) asking that the Commission order MTRC to provide the necessary services, tracks, and facilities to permit operation of Amtrak trains into and out of the new station under construction in the Minneapolis-St. Paul area. Amtrak also asked that we set the terms of compensation.

Several years ago Amtrak began to look for a new location for its Minneapolis-St. Paul, MN, passenger terminal. Its existing passenger terminal was inefficient and expensive. In 1976, the Port Authority of the city of St. Paul (Port) agreed to construct a new terminal. The Port purchased the new station site from Burlington Northern Inc.

(BN), Chicago & North Western Transportation Company (C&NW), Chicago, Milwaukee, St. Paul & Pacific Railroad Company (MILW), Chicago, Rock Island & Pacific Railroad Company (RI), and Soo Line Railroad Company (SOO), who owned the property as tenants in common.

The site is adjacent to MTRC's main line, approximately equidistant from the city centers of St. Paul and Minneapolis. The Port also agreed to pay for the upgrading of the existing MTRC tracks (which provide access to the new terminal), the installation of certain new switches and station track, and certain other construction needed to insure operation to and in the new station. Amtrak plans to execute a twenty (20) year lease for the use of the station.

The station was scheduled to be completed in February 1978. By order of division 3, issued September 26, 1977, MTRC was ordered to provide Amtrak the services, tracks, and facilities necessary to insure Amtrak trains access to the new terminal.

That order also set the proceeding for modified procedure to establish the compensation to be paid by Amtrak. Initial verified statements were filed by Amtrak. Verified statements were then filed by MTRC, and jointly by BN, RI, and SOO (interveners). Amtrak filed a reply to these statements.

MTRC is a Minnesota corporation which owns and operates railroad terminal facilities in an industrial area between the cities of Minnespolis and St. Paul. Its stock is owned by the connecting line-haul carriers—BN, CNW, MILW, RI, and SOO. MTRC has no railway operating income. Its primary source of income is rent charged for the use of its joint facilities.

Most of the operating and maintenance expenses of MTRC are divided among the owning railroads on the basis of car counts or other accepted "Use Proportion" bases. The nonvariable operating expenses, however, are divided equally among the owning railroads.

Presently, MTRC acts as an agent for its member railroad companies, handling the interchange of cars between the member railroads, and performing industrial switching to approximately 250 industries located along MTRC's 14 miles of main-line tracks. Also, interchanges are made at MTRC's main yard by each member railroad. Approximately 80 cars are received each day from the members, and a like number are forwarded by MTRC to them. This usage results in 4,800 cars per month.

Amtrak claims that it operates four trains per day into and out of its Minneapolis station. When operations are shifted to the new station, all trains will be routed over MILW track from Division Street to a junction known as Merriam Park, where Amtrak trains will then proceed over approximately 9,500 feet of MTRC track to St. Anthony Tower. Midway between Merriam Park and St. Anthony Tower, Amtrak trains will stop or terminate at the new station facility adjacent to the MTRC tracks.

Amtrak's occupancy of the new station will also require the use of certain ancillary facilities, including the 1600-foot long west leg of MTRC's wye track at Merriam Park and MTRC's roundhouse. The wye track at Merriam Park will be used to turn locomotives and cars. MTRC's roundhouse is the only facility in the area suitable for servicing Amtrak locomotives. To effectively use the roundhouse, Amtrak must be permitted to travel over a 480-foot segment of MTRC track from the main MTRC station lead to the roundhouse. Amtrak must also have the right to share the use of roundhouse stall No. 2, the 25-ton overhead crane, shop machines, air supply, toilet facilities, and fueling facilities for emergency use. Amtrak also requested exclusive use of 400 square feet of storage space within the roundhouse and eight lockers in the locker room facilities.

Amtrak's occupancy of the new terminal will necessitate use of certain MTRC services. Amtrak suggests these include switching, yardmaster's time, clearing of wrecks, and snow removal.

Both Amtrak and MTRC have sumitted proposed agreements.[1] All of the proposals include a provision excusing MTRC from providing "operating crews for operation or switching of Amtrak trains." The proposals also contain a provision for reimbursement to MTRC for the cost of fuel oil provided to Amtrak trains on an emergency basis. The same compensation figures for utilities,[2] and operations[3] have been proposed.

DISCUSSION AND CONCLUSIONS

In reciting the common terms of the various proposed contracts, we do not suggest that the parties agreed to be bound by these terms. No single provision can be presumed to have been decided since no agreement was signed by the parties. These terms are worthy of some consideration, however, since they provide insight into the major areas for contention. We will give some weight tothe proposed agreements.

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[1] Amtrak's proposed agreement submitted April 14, 1977; MTRC's proposed agreement submitted June 17, 1977; MTRC's revised proposed agreement submitted July 26, 1977; and Amtrak final proposed agreement submitted August 5, 1977.

[2] Amtrak would pay 50 percent of the cost of utilities used by MTRC. The estimated cost is $783 per month.

[3] Both parties include a payment of $6,160 for operations, including use of tracks and facilities. However, they do not agree on what costs are included in the operation fee.

In setting the compensation to be paid by Amtrak for the use of MTRC's services, tracks, and facilities, we are guided by the terms of section 402(a),[4] which obligates the Commission to establish "just and reasonable" compensation. "Incremental costs"[5] is used as the base level of compensation for all *services* provided to Amtrak. This level of compensation is supplemented on the basis of the quality of the service provided.

Amtrak claims that the incremental cost language of section 402(a) is also applicable in computing the compensation for the use of MTRC's tracks and facilities, limiting track and facility compensation to incremental costs. This argument has been rejected previously. Since the incremental cost langauge in section 402(a) only refers to the provision of "services," we do not believe Congress intended to limit compensation for the tracks and facilities to incremental costs. See *Amtrak and Tex. and P. Ry. Co., Just Compensation*, 348 I.C.C. 645 (1976) (*T&P* case) and *National R. Pass. Corp, and TRRA Just Compensation*, 348 I.C.C. 901 (1977) (*TRRA* case).[6]

MTRC suggests that we use the compensation standard presented in section 3(5) of the Interstate Commerce Act (act), i.e., condemnation principles. Since RPSA does not mention the condemnation standard, we see no reason to apply it in these proceedings. See also *Amtrak and Wash. Term. Co., Tracks and Facilities*, 348 I.C.C. 86 (1975) (*WTC* case).

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[4] The Corporation (Amtrak) may contract with railroads *** for the use of tracks and other facilities and the provision of services on such terms and conditions as parties may agree. In the event of a failure to agree, the Interstate Commerce Commission shall, within ninety days after application by the Corporation, if it finds that doing so is necessary to carry out the purposes of this Act, order the provision of services or the use of tracks or facilities of the railroad by the Corporation, on such terms and for such compensation as the Commission may fix as just and reasonable, and the rights of the Corporation to such services or to the use of tracks or facilities of the railroad *** shall be conditioned upon payment by theCorporation of the compensation fixed by the Commission. In fixing compensation in excess of incremental costs, consider quality of service as a major factor in determining the amount (if any) of such compensation. *** 45 U.S.C. 562(a).

[5] RPSA was amended by the Amtrak Improvement Act of 1973 to include the incremental cost standard. The conference committee explained:

> *** The term "incremental" is to be considered then as meaning those costs which would not be incurred if a particular service were not rendered or a given amount of traffic were not handled. This includes total solely related (or direct) costs of a particular service (both variable and fixed portions of solely related costs), but does not include any portion of common costs. This is also sometimes referred to as "avoidable costs." H. R. Conf. Rep. No. 93-587, 93d Cong. 1st Sess at 16 (1973).

[6] Both proceedings are pending on appeal to the U.S. Court of Appeals, District of Columbia Circuit.

Congress has given the Commission broad discretion to set just and reasonable compensation for tracks and facilities, so that compensation awards may be tailored to varied situations. Congress did not suggest that railroads providing tracks and facilities to Amtrak subsidize Amtrak's activities by accepting incremental costs as the total compensation. See *TRRA* case, *supra*, at 921. Amtrak will be treated as any other user of tracks and facilities, and will be expected to pay its fully allocated share of these costs.

MTRC apportions most of its costs on a "use" basis. This is a practical approach which has been applied in many compensation proceedings. See *WTC*, *T&P*, and *TRRA* cases, *supra*, and *National R. Pass. Corp. and UP Tracks & Facilities*, 348 I.C.C. 926 (1977) (*UP* case). Unfortunately, MTRC has not provided us with many specific examples of its "use" criteria. We have applied various "use proportion" bases for allocating expenses, which are explained in the relevant sections of this report.

In fixing just and reasonable compensation, we will treat each cost category separately. The liability issue is discussed first, since it affects our treatment of certain other compensation provisions. We then turn to the costs associated with the tracks and facilities. Finally, we consider the costs related to services. We have also established a quality of service standard to apply to common service costs.

Before discussing the individual cost items, we must express our dissatisfaction with the parties' presentations. We have not been provided with a complete record upon which to base our decision. The inadequacy of the record makes our task extremely difficult and delays resolution of the disputes. It subverts the mandate of section 402(a). We expect future presentations to be more complete.

LIABILITY PROVISION

Amtrak's use of MTRC tracks and facilities may result in an increased potential for liability and some arrangement should be made to reimburse MTRC for this additional risk.

MTRC argues that Amtrak should fully indemnify it for any increased liability costs arising, directly or indirectly, from Amtrak's use or presence (except where the damage results solely from the negligence of MTRC or another railroad). Amtrak would be expected to pay any increase premium for catastrophic liability insurance attributable to the institution of passenger service. Amtrak would also be required to place MTRC and all railroads using the MTRC facilities as insured parties under any policy it purchased covering the liability risk assumed under its operating agreement with MTRC. Amtrak and the insurers would have no recourse to these insured parties under the terms of their agreement.

MTRC supports its proposal by noting that full indemnification provisions have been included in trackage rights agreements and Commission decisions pursuant to section 1(16) of the act. However, the policy considerations involved in establishing operating arrangements for freight shipments and passenger travel are very different. The liability arrangements established under section 1(16) are not determinative in a proceeding under section 402(a) of RPSA.

MTRC also cites section 402(c) of the RPSA as justification for the full indemnity clause. That section requires broad casualty risk protection for the operating railroad when tracks and facilities are made available to Amtrak on an emergency basis. Since section 402(a) does not include this language, the same casualty risk treatment was not meant to be applied. In an emergency situation, the Commission does not have time to evaluate all of the liability problems before issuing an order. This expedient solution may only be used until the section 402(a) application can be processed.

Interveners join in MTRC's request for full indemnification. They maintain that this situation should be treated like a detour agreement, since both involve one carrier being compelled to allow another to use its tracks and facilities. We reject this argument. The detour situation may be distinguished, because it involves a temporary arrangement with limited effect. The operating agreement in issue here is likely to be in effect for a much longer period of time. The impact of a full indemnity provision would be much more burdensome.

Amtrak suggests that MTRC's proposal would insulate MTRC from the consequences of its own negligence. MTRC is willing to accept responsibility for damages arising solely from its negligence. Consequently, this argument is not a basis for rejecting the MTRC proposal.

Nevertheless, we cannot accept the full indemnification clause. It would obligate Amtrak to pay for more than its fully allocated share (the proximate consequences of its negligence). This economic burden would hamper the rejuvenation of intercity passenger service. Our approval of such a proposal would contravene the dictates of the RPSA.

Amtrak proposes the adoption of section 7.2[7] of its current basic agreement with the contracting railroads.[8] Under the provisions of section 7.2, Amtrak would bear the complete risk of liability for death or injury of Amtrak passengers (including accompanying parties) and Amtrak employees, and for death, personal injury, or damage to the property of third parties resulting from grade crossing accidents involving Amtrak trains. Amtrak would also be responsible for damage to any equipment operating on its trains, regardless of the cause.

MTRC, on the other hand, would be responsible for all other risk of liability, including the risk of injury or death of MTRC employees, and damage to its own equipment and facilities. MTRC would be compensated for assuming this risk at $0.0734 per train mile.

This apportionment of responsibility is administratively convenient. It avoids lengthy and complicated disputes over causation and fault. Amtrak has used this provision in virtually all its operating agreements, including those with terminal associations.[9]

This clause was developed through extensive arm's length negotiations with the various railroad's and terminal associations whose services and facilities Amtrak uses. Neither MTRC, nor interveners have produced any evidence to distinguish this transaction. They have not shown the terms to be unreasonable or inequitable. We see not reason to substitute our judgment for that of the marketplace.

Amtrak alternatively proposes that, if the section 7.2 proposal is unacceptable it join the existing liability arrangement between MTRC and its member railroads. That arrangement allocates liability on the basis of fault. It notes that we ordered Amtrak to be included in the existing terminal railroad liability arrangement in the *WTC* case, *supra*.

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[7] Amtrak has not provided a copy of the relevant portions of its basic agreement. We have taken official notice of the payment provision found in the amended basic agreement (section (e)). See, for example, the *T&P* case, at page 674.

[8] Those railroads which originally availed themselves of the opportunity to transfer responsibility for intercity rail passenger service to Amtrak.

[9] There are two exceptions—Washington Terminal Company (WTC) and Los Angeles Union Passenger Terminal Co. (LAUPT). In the WTC situation, Amtrak was made a party to the 1907 Operating Agreement adhered to by all other users of the facilities. Amtrak's contract with LAUPT requires it to assume the risk of liability to third parties; Amtrak claims it agreed to accept this liability in exchange for the right to receive concession revenues otherwise payable to LAUPT.

Both MTRC and the interveners object to this suggestion. They argue that it is not just and equitable to permit Amtrak to "forces its way onto the MTRC properties and participate on any basis existing among the present owners who have invested their monies in the common venture involving freight operations and management of MTRC for many years, and have abided by its rules."[10]

Interveners distinguish the *WTC* case because it involved an explicit arrangement, while the MTRC situation involves an informal arrangement. They also claim the *WTC* agreement was designed to cover passenger operations as well as freight operations. The contract was also written to include carriers without proprietary interests as well as member carriers. Thus, the *WTC* situation was more conducive to the application of the existing agreement.

We believe that the *WTC* situation was significantly different from that now before us. We are convinced that the section 7.2 proposal provides a more practical resolution of this issue. We shall order the implementation of the Amtrak liability provision. See appendix I.

Both MTRC and interveners claim that the $0.0734 figure (twice the rate paid to the contracting railroads) is grossly inadequate. Interveners point out that the tracks and facilities involved are in a densely populated, high risk area.

Amtrak argues that the liability exposure of MTRC is very limited. Less than 2 miles of trackage will be involved. Trains will be operating at yard speeds, and all switching and train movements will be at the direction of MTRC yardmasters. Loading and unloading of passengers, mail, and express will take place on Amtrak property. Foreign road crews are treated as Amtrak employees for the purpose of section 7.2's liability coverage. Finally, only one grade crossing is involved, and it is situated on the leg of the wye which would be used only for turning equipment.

The comments of the parties are too general and vague to support our resolution of this issue. It does appear that the $0.0734 figure, which was adequate in the *T&P* case, may not be adequate here. The mileage involved in the *T&P* case (6,448 train-miles per month) was significantly greater than the mileage involved here. Although we will order the institution of the liability clause proposed by Amtrak, we cannot set the train-mile rate of compensation. We direct the parties to resolve this issue among themselves.

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[10] See page 18 of interveners' verified statement.

TRACKS AND FACILITIES

Running rights.—Amtrak suggests that $100 per month is the commercially reasonable rent to pay for use of MTRC tracks between Merriam Park and St. Anthony Tower and the west leg of the wye. This assumes that the court upholds the *T&P* precedent.

MTRC proposes a substantially higher figure, $1,754 per month for "running rights." This figures is computed by calculating the track value as $20 per track foot, and the land value at $1 per square foot. MTRC also assumes that Amtrak will receive 75 percent of the benefit of the line. These values are applied to the 11,100 feet of track that Amtrak will use, as follows:

Track	
(11,100 track feet) x ($20 per track foot) x (7.5 percent revenue) x (75 percent Amtrak benefit) divided by (12 months) equals	$1,040.63
Land	
(11,100 feet-2,150 feet length) x (17 feet width) x ($1 per square foot) x (7.5 percent return) x (75 percent Amtrak benefit) divided by (12 months) equal	713.20
Total monthly payment	1,754.00

Amtrak provides no explanation for its proposed rental fee, nor does it rebut MTRC's contentions. Consequently, its figure has little persuasive value to us.

Although MTRC's presentation is far from complete, it does provide us with enough information to judge the reasonableness of its proposals. The monthly rental figure appears to be somewhat inflated. MTRC suggests that Amtrak receives 75 percent of the benefit derived from use of the involved line. MTRC presently handles approximately 160 cars a day. Amtrak plans to run four trains a day into and out of the terminal, but has not indicated the number of cars in each train. Taking notice of "The Official Railway Guide" of March 1978, we can estimate the average number of cars on the Amtrak trains.[11] We find that Amtrak's benefit is significantly lower than the 75 percent figure. We will place our recomputed figure (20 percent) in the MTRC formula.

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[11] "The Official Railway Guide" identifies three Amtrak trains using the Minneapolis-St. Paul terminal. We will use this current schedule figure rather than the four train estimate.

The Arrowhead runs a total of eight times a week in each direction. It includes a coach, snack bar coach, baggage car, and locomotive. There is probably more than one coach car, but for the reasons described in the body of the report, we chose to stay on the conservative side. This means that approximately nine cars a day will travel through MTRC facilities.

The combined North Coast Hiawatha/Empire Builder run seven times a week in both directions. It consists of at least two sleeping cars, two coaches, a diner, a dome coach, a dome lounge, a dome sleeper, a baggage car, and two locomotives. This equals 22 cars daily.
(footnote continued on next page)

We realize that a car count standard will not take into account the fact that freight cars are heavier than passenger cars and cause more wear and tear on the track. Nor does the car count standard reflect that a freight car will generally require more time to maneuver than passenger cars. The car count standard is administratively convenient, though. We have kept our estimates low to take into account these time and weight factors.

We find MTRC's $20 per track foot[12] for the value of track, and its average land value of $1 per square foot, to be reasonable.

The 7.5 percent rate of return is reasonable. The railroad industry's current estimates of average debt cost have been around 8 percent. Interveners argue that MTRC would be justified in asking for its cost of capital. They suggest that MTRC's cost of capital is similar to that of BN (11.25 percent). Since MTRC limited its request to 7.5 percent, interveners believe the result is reasonable.

Interveners' application of the cost of capital theories is not completely accurate; both before- and after-tax figures are used.[13] Recomputing BN's figures so that all components are included in their after-tax form, we find BN's cost of capital to be 9.96 percent. We do not agree that a terminal association would have the same cost of capital as BN. The divergent functions of the two types of rail

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(footnote 11 continued)

The Twin Cities Hiawatha runs seven times a week in both directions. It consists of at least an Amcoach, an Amdinette, a baggage car, and a locomotive. This equals eight cars per day.

The total daily activity is estimated to be 39 cars. The terminal will be handling approximately 199 cars a day with the additional Amtrak traffic. Amtrak's activity will represent approximately 20 percent of the traffic.

[12] There are approximately 360 net tons of 90 pounds and 110 pounds rail currently on the 11,100 track feet of rail that Amtrak proposes to use. The current value of the rail at a relay or second-hand price ($174 per net ton) would be approximately $62,600. This is a conservative estimate since we are not using the improved rail weights, nor are we using new rail values.

Valuation Docket No. 1053, *Minnesota Transfer Ry. Co.*, 137 I.C.C. 639, provided us with data to develop the proportional share of the total current value for trackage that each component of the trackage would provide (ties, rails, other track material, ballast and track laying and surfacing). Applying these proportions to the $62,600, we estimate that the track value for the footage in issue would be approximately $190,000 or $17 per track foot. If we add to this an allocated portion of the engineering, grading, culverts, drains, communication system and signals costs, MTRC's $20 per track foot appears reasonable.

[13] Joseph J. Plaistow, in his verified statement, used embedded debt, leases, preferred stock, and common equity as his components of cost of capital, weighted at 33.99, 5.02, 4.53, and 56.46 percent according to BN's capital structure. The actual costs of each component were identified as 6.34 (debt), 8.80 (leases), 9.8 (preferred stock), and 14.5 (common equity). The debt and leases are before-tax figures, while the preferred stock and equity figures are after-taxes. To get an accurate after-tax figure, we have reduced the debt and lease figures to take into account the taxes. We estimated BN's tax rate to be 50 percent. The computations are as follows:

(footnote continued on next page)

services (i.e., line haul v. terminal operations) would give rise to different investment needs and correspondingly different capital structures. The comparison with the BN cost of capital does support our finding that the 7.5 percent rate of return is reasonable.

Recomputing MTRC's running rights formula with a 20 percent Amtrak benefit, we find that the appropriate fee is $468 a month.[14]

Track maintenance.—Amtrak believes that there will be no incremental maintenance costs. The limited amount of activity Amtrak will generate and the low operating speed of its trains on the MTRC track (i.e., 20 mph) will result in little track wear. Furthermore, Amtrak argues the rehabilitation work currently in progress will more than compensate for the increased activity since it should reduce the need for maintenance during the entire 20-year period of Amtrak's station lease.

MTRC points out that the rehabilitation includes no upgrading for the 1,600 feet of the west wye track. MTRC has done little maintenance work on this section since it has been considering the retirement and removal of the line. As a result, substantial maintenance would be needed. MTRC also claims maintenance of the highway crossing at Cleveland Avenue and the railroad diamond crossing is costly. Furthermore, since 4,000 feet of the 9,500 feet of track to be rehabilitated will not receive new rails, the trackage will

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(footnote 13 continued)

Capital component	Capital cost	Percent of capitalization	Tax. rate	After-tax weighted cost
		Percent		*Percent*
1. Debt	6.34	33.99	0.50	1.08
2. Leases	8.80	5.02	0.50	0.22
3. Preferred stock	9.80	4.53	N/A	0.47
4. Common equity	14.50	56.46	N/A	8.19
5. Total		100.00		9.96

[14]

Track	
(11,100 track feet) x ($20 per track foot) x (7.5 percent return) x (20 percent Amtrak benefit) divided by (12 months) equal	277.50
Land	
(11,100 feet-2,150 feet length) x (17 feet width) x ($1 per square foot) x (7.5 percent return) x (20 percent Amtrak benefit) divided by (12 months) equal	190.18
Total	467.68

require yearly maintenance. Finally, MTRC points out that its 1977 maintenance budget includes $124,000 for labor costs alone (excluding fringe benefits, roadway maintenance, track laying and surfacing, and removal of snow, ice, and sand).

MTRC proposes a payment of $1 per track foot per year, with 60 percent of the cost allocated to labor, and 40 percent to materials. For the 11,100 feet of track in issue, a payment of $925 a month would be required.

We believe that Amtrak's activity will generate some wear and tear; even new trackage requires some maintenance. MTRC computations, however, appear to be high. Using 27 of the most current abandonment applications filed with the Commission, we have recorded the estimates of annual maintenance costs after track rehabilitation. For the 900 miles of track in those proceedings, the average cost was $2,900 per mile, or $0.55 per track foot. MTRC has presented no evidence which would suggest that its maintenance cost would be greater than this. The 20-percent benefit figure developed in the running rights section is applicable to this maintenance computation since wear and tear is a function of the number of cars that travel over the involved line. We find that Amtrak should pay MTRC $101.75 a month.[15]

Track inspection.—MTRC points out that the Federal Railroad Administration (FRA) requires monthly inspections for freight yard tracks. However, FRA track safety standards require that track used for passenger service be inspected twice each week, 49 CFR 213.233. Thus, seven out of the eight inspections per month constitute an incremental cost which should be borne by Amtrak.

The estimated monthly track inspection cost submitted by MTRC is $73. The figure appears to represent the full cost for inspecting this section of the line. As a result, Amtrak is ordered to pay seven-eights of the estimated cost, $63.51. MTRC can recover a portion of the common cost if it meets the performance standard established in the service section of this report. We leave the method of allocation to be determined by the parties. It proposes to reimburse MTRC $230 per month for shared use of the roundhouse and lead track into the roundhouse, plus $70 per month for the storage area allocated for the exclusive use of Amtrak. It has provided no cost evidence to explain how these amounts were derived, nor has it attempted to rebut MTRC's cost calculation.

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[15] (11,100 feet) x ($0.55 per track foot) x (20 percent Amtrak benefit) divided by 12 = $101.75.

MTRC calculates Amtrak's rental for the roundhouse to be $1,735 per month.[16]

Amtrak will service two or three locomotives a day in the roundhouse, while MTRC will service five. On this basis, Amtrak proposes to pay three-eights of the total utility cost. This is also the benefit figure used by MTRC in its roundhouse computations. We adopt this figure for our calculations.

We will replace the $1 per track foot for maintenance, which we have found to be excessive, with the $0.55 per track foot figure, discussed in the track maintenance section of this report. This will reduce the monthly maintenance figure from $15 to $8.25.

We accept the other figures used by MTRC. We find that Amtrak should pay MTRC $1,728—a month for the involved roundhouse, tracks, and facilities.

MTRC requests that it be given the option to close the roundhouse upon reasonable written notice to Amtrak, or have Amtrak pay the full costs attributable to the operation of the roundhouse if MTRC stops using the facility. Amtrak does not object as long as it is given 90 days notice and the option to purchase the facility at the then current market value. We will incorporate Amtrak's proposal in the parties' operating agreement.

Roundhouse utilities.—Amtrak proposes that the roundhouse utility costs be allocated in proportion to the number of locomotives serviced in the facility. It is willing to pay a pro rata share equivalent to three-eights of the total utility cost.

MTRC argues that the total cost of utilities should be borne equally by MTRC and Amtrak. MTRC alleges that Amtrak's locomotives travel substantially greater distances and, therefore, require more service. It suggests that three of Amtrak's locmotives would use as much utilities as five of MTRC's locomotives. MTRC provides no data to support this claim. Amtrak disputes the claim

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[16] J. A. Lehn's verified statement, pp. 15-16.

Shop—(5,360 square feet area) x ($3.50 rental rate) divided by (12 months)	$1,563.33
Storage area—(400 square foot area) x ($3.50 rental rate) divided by (12 months)	116.69
Trackage—(480 track feet) x ($10 per foot) x (7.5 percent return) x (0.375 benefit) divided by (12 months)	11.25
(480 feet of land x 17 feet area) x ($1.50 per square foot) x (7.5 percent return) x (0.375 benefit) divided by (12 months)	28.69
(480 track feet) x ($1 maintenance/foot) x (0.375 benefit) divided by (12 months)	15.00
Total monthly payment	1,735.00

because it plans to do only routine maintenance and periodic inspections at MTRC's facilities.

Neither party provides convincing evidence to support its allocation formula. Amtrak's formula is simple to apply. But the number of locomotives that use the roundhouse facilities has little relation to the consumption of utilities. Every locomotive that is brought into the roundhouse does not require the same amount of maintenance. Although we found a locomotive count standard appropriate for the roundhouse trackage computations, we do not find it adequate for the utility calculation.

We recognize that no general standard will guarantee that each party will pay for only the electricity, water, gas, and oil it uses. However, roundhouse utility consumption is more closely related to the amount of time spent in the roundhouse than to the number of locomotives that go through it. Since the utility expense is not a "service," Amtrak must pay its fully allocated share. We order Amtrak to pay its proportionate share of the actual monthly utility bill based on the ratio of hours it uses the roundhouse to the total number of hours the roundhouse is used by all parties during the month.

Taxes.—Amtrak and MTRC agree that Amtrak should reimburse MTRC for any additional taxes on earnings, sales, and payroll[17] which are paid by MTRC as a result of Amtrak's operations and presence on MTRC property.

Both MTRC and Amtrak believe that the Minnesota *ad valorem* property tax may be increased to replace the gross earnings tax. They do not agree on how the *ad valorem* tax should be allocated.

The Commission has applied a train-mile basis of allocation of property taxes in other compensation cases. See *T&P* case, *supra*, at 664. However, this standard would not be effective in this proceeding, since it would not adequately reflect Amtrak's benefit from the use of the roundhouse facilities.

Amtrak claims that it should only be required to pay the incremental portion of the tax (the amount the tax is increased to take into account the improvements prompted by Amtrak's presence). Amtrak believes that the current tax liability is a common cost, not Amtrak's responsibility under section 402(a).

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[17] Minnesota imposes payroll tax at the rate of 2 mills for every dollar of compensation above the first $250,000 of compensation paid each year. Railroads are presently exempt from this tax, but there are proposals before the legislature to repeal the exemption. In the event that the exemption is repealed, MTRC would expect Amtrak to pay the tax generated by its use of MTRC's services and facilities.

A property tax falls under the category of expenses that arise from the existence of the tracks and facilities (not services) and, therefore, Amtrak would be obligated to pay its fully allocated portion of the tax.

MTRC suggests that the tax be shared by Amtrak on the basis of use, and MTRC's proposed contracts include provision for the payment of 50 percent of the property tax liability by Amtrak. Our estimates (developed above) do not support the assumption that Amtrak's use will amount to 50 percent of the activity over MTRC. MTRC does not offer any explanation for the selection of this figure. Since the volume of activity over the line and the extent to which Amtrak uses the roundhouse facilities are relevant factors to consider in allocating the property tax, we shall apply the estimates we have computed above. Since we cannot judge the relative weight to be afforded to each factor on the present record, we will average the two figures. We calculate Amtrak's estimated "use" of the MTRC property to be 29 percent.[18] Amtrak should pay 29 percent of the *ad valorem* property tax currently levied, plus 29 percent of any increase arising from the replacement of the gross earning tax. This shall not include property tax increases attributable to the current track improvements, which are to be paid by Amtrak as incremental costs.

Fuel oil and supplies.—Amtrak and MTRC agree that Amtrak will reimburse MTRC for the actual cost of any fuel oil or supplies provided to Amtrak on an emergency basis.

SERVICES

Switching services.—MTRC claims that it does not own sufficient switch engine power, nor have a sufficient number of qualified enginemen, firemen, or switchmen to perform the switching requested by Amtrak. Amtrak is willing to provide its own locomotive and switch crews.

Amtrak states that the United Transportation Union (UTU) believes the switching work should be done by MTRC employees. The Brotherhood of Locomotive Engineers (BLE) has not commented.

We see no reason why MTRC should provide a locomotive for Amtrak's switching needs. Amtrak is ordered to provide its own switching engine and make its own arrangements for the engine's repair and maintenance. The union negotiations do not affect this aspect of the carriers agreement.

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[18] [Amtrak's use of track (20 percent) + Amtrak's use of roundhouse facilities (37.5 percent)] divided by 2 = 28.7 percent.

The assignment of switching crews is a matter for Amtrak and MTRC to resolve with UTU and BLE. We have no jurisdiction to mediate this labor dispute.

In the event that the MTRC union commitments obligate it to provide all switching services, both Amtrak and MTRC agree that Amtrak will reimburse MTRC for any costs incurred. The parties disagree as to what these costs are.

MTRC proposes that Amtrak pay for the labor used to perform Amtrak's switching on a cost per hour basis. In addition, MTRC expects Amtrak to pay for: (1) costs involved with hiring, training and supervising the additional enginemen and switchmen needed, (2) the reduced productivity of its present freight switching operations, and (3) the job protection benefits for which these new employees will be eligible.

Amtrak is willing to reimburse MTRC for all identifiable costs of performing the switching service and for the hiring and training these new employees, including job protection obligations and fringe benefits. Amtrak objects to the claim that it should pay for the supervision of these new employees because there is no evidence to suggest that additional supervisors would be needed. Amtrak is willing to pay for the supervisory expense, though, if MTRC can show the causal relationship. We note that MTRC also may recover a portion of the supervisory expenses as common switching costs, if it meets the performance standard we are establishing.

Similarly, Amtrak objects to the productivity argument because MTRC has provided no proof that the productivity will be reduced. Amtrak points out that its activity over MTRC will be limited, and relatively few Amtrak switching moves would be required. We conclude that the lost productivity cost will be reflected in the portion of the common switching costs allocated to Amtrak.

The parties do not provide any evidence on what these common costs are and how they should be allocated. The Commission's rules governing the *Separation of Operating Expenses Between Freight and Passenger Service, Railroads*, 49 CFR 1242.0, *et seq.* (Operating Expense Reg.) provide a reasonable standard. The regulations require all class I railroad companies to allocate the common expense related to yard operations on the basis of yard switching hours. We believe a similar allocation standard would be reasonable for MTR, even though it is not a class I railroad. See *T&P, supra,* at 662.

If MTRC meets the performance standard established in this report, Amtrak will be required to compensate MTRC for a portion of the common switching expense. Its allocated portion will be computed by comparing the number of yard switching hours spent in a particular month switching Amtrak trains against the total number of yard switching hours spent switching all trains through the relevant MTRC track.

Yardmasters' services.—MTRC urges the Commission to order Amtrak to pay 2 hours of each yardmaster's shift. MTRC calculates this amount to be $1,673 per month. It applies a similar charge to its member railroads for their operations under the jurisdiction of the MTRC yardmaster. In addition, Amtrak would be expected to pay for any additional yardmasters needed to handle its operations.

Amtrak recognizes its obligation to fully reimburse MTRC for any yardmaster time added to service Amtrak. Amtrak rejects the claim that it should also pay a portion of the current yardmaster expense. It reasons that since MTRC will experience this expense even if Amtrak does not operate over the line, it is *not* an incremental cost, and is not recoverable under the 402(a) standard.

Section 402(a) uses "incremental costs" only as a base for compensating a railroad for services provided to Amtrak. The base compensation is to be supplemented on the basis of the quality of performance. MTRC has a right to recover both the incremental cost and a portion of the common yardmaster expense, if it meets the performance standard.

We question the appropriateness of the 25 percent yardmaster time allocation proposed by MTRC. We have estimated Amtrak's activity (by car count) to be 20 percent. We recognize that there may not be sufficient correlation between Amtrak activity and the amount of time that the yardmaster will spend on Amtrak-related work; therefore, we do not propose to apply our 20 percent figure. Rather, we return to the Operating Expense Regulations for guidance. Section 1242.42 provides that common yardmaster expenses be apportioned on the basis of "yard-switching hours."

The "use proportion" developed by the parties to comply with the common costs allocation for switching services should be applied here. MTRC will only receive the allocated portion of the common yardmasters' expense if MTRC meets the performance standard established later in this report.

Miscellaneous services.—Amtrak acknowledges that it will pay for all incremental costs generated by it. For example, it agrees to pay for snow removal when it is sole user of the line.

Amtrak avers that the MTRC expenses arising from general supervision and billing and accounting are not incremental costs. Amtrak states that it will supervise most of its train operations, which will be limited. It claims that MTRC supervision will be negligible, that the billing and accounting generated will be nominal, and that no additional employees or overtime will be required.

MTRC rejects these allegations, pointing out that it has only four employees in its administrative offices. MTRC argues that Amtrak's activities will generate substantial service, supply and material disbursements, and that administrative costs will increase.

The evidence does not justify a finding that the general supervisory, billing, and accounting expenses are incremental costs. MTRC will be able to recover a portion of these costs if it meets the performance standard. We leave the method of allocation to be determined by the parties.

Clearing wrecks.—MTRC believes it should be reimbursed for the cost of clearing all wrecks arising from Amtrak's use, and of restoring the track and roadbed (including fringe benefits and material handling charges).

Amtrak argues that, to be consistent with the liability provisions it proposes, it should be responsible only for the actual costs MTRC incurs clearing wreckage of Amtrak equipment.

We agree that the wreckage provision should be consistent with the liability provision. However, this does not require that Amtrak avoid paying for the cost of restoring the track and roadbed after a wreck involving an Amtrak train.

The underlying premise in the adoption of Amtrak's liability proposal was that it would avoid lengthy disputes over causation and fault. Where an Amtrak train is the only train involved in the wreck, it is unlikely that there will be any difficulty in identifying the track and roadbed damage caused by the Amtrak train. In such an instance, Amtrak shall be responsible for the cost of clearing all wreckage, and repairing the track and roadbed.

Where the wreckage results from the collision of an Amtrak train with another train, the causation and fault issues become a problem. To avoid this problem, and to be consistent with the liability provisions, we will require that Amtrak pay for the clearing of all objects from the tracks, except MTRC property.

The allocation of liability for the repair of the tracks and roadbed will be left to common law liability principles. This decision does not bind third parties who might be involved in the collision. If we were to establish an apportionment standard for allocating the payment for repair of the tracks and roadbed, MTRC might not be able to collect the third parties' portion and would have to assume this risk itself. We do not believe this is a reasonable burden to place on MTRC.

QUALITY OF SERVICE STANDARD

Section 402(a) establishes a bifurcated system of compensation for services. First, we computed the incremental costs associated with Amtrak's use of MTRC's services. This provided the base level of compensation. Second, we computed the portion of common costs associated with these services allocable to Amtrak.

The second level of compensation is not automatically paid, however. Section 402(a) mandates that the quality of the services provided determines the extent to which the railroad is compensated for the portion of its common costs allocated to Amtrak.

We must establish an objective standard to gauge the quality of services. Amtrak suggests that such a standard is unnecessary. It reasons that incentive provisions are only appropriate where line-haul operations are involved, citing the *WTC* case. We cannot agree with its interpretation of the *WTC* case. We rejected the need for a quality of service standard in that case because the business of the carrier involved was almost entirely passenger service related. As a result, it had no motive to discriminate against the Amtrak service.

Here, however, a freight terminal association is being asked to provide services for a passenger service. The potential for discrimination is almost as great in this situation as it would be with a line-haul freight carrier. A performance standard is appropriate. Furthermore, even if we were to decide that incentive payments were not necessary, we would still need a performance standard to provide the parties with the means to decide whether Amtrak should pay a portion of MTRC's common costs.

We approved the use of an on-time performance standard in several similar compensation cases. See *T&P* case, at 672, and *UP* case, at 150. In those cases, we established 80 percent on-time performance as a baseline level of performance. If the involved railroad performed at or above that level during the month, the railroad would receive the portion of its common costs allocated to Amtrak. It would also receive incentive payments for each one percent above the 80 percent baseline.

A similar performance standard seems appropriate here. We recognize, however, that a terminal operation presents different problems than the line-haul operations in issue in the prior cases. The *T&P* and *UP* standard used the existing schedules with modifications, as the standard. The MTRC terminal operations involve short distances, limited activity and short periods of time. A late delivered train would make this standard unmanageable, since even a short delay would amount to a significant portion of the time scheduled for many of the terminal activities.

We propose that the parties develop a separate time schedule that establishes the amount of time the specific terminal functions for a particular Amtrak train will take. On-time performance will then be judged from the time the train is delivered to the terminal until the train leaves the terminal or reaches its destination at the terminal site. This standard eliminates the effect of late delivered trains on MTRC's performance, except for Acts of God. As a result, we propose 95 percent on-time performance as the baseline level of performance.

Given the short time intervals involved, we doubt that an effective incentive system could be devised for terminal operations. Since the parties have not addressed the issue, we will not propose any incentive procedure.

MISCELLANEOUS

Interveners suggest that MTRC's articles of incorporation and bylaws do not authorize the corporation to perform passenger service operations. We do not have the information to verify this. We suggest that MTRC look into this matter and take whatever steps are necessary to insure that it would not be violating its charter and bylaws.

MTRC and Amtrak should enter into a contract embodying the provisions of this report. We expect the parties to make a good faith effort to reach agreement.

MTRC shall compute the amounts owed by Amtrak for each month of operation, following the guidelines set out in this report, and shall forward a statement of the charges to Amtrak. Amtrak shall have the right to audit or inspect MTRC's records and accounts relating to Amtrak operations, provided it gives the railroad reasonable advance notice. MTRC shall have the right to have a representative present at all times during any such audit or inspection. MTRC shall maintain accounts and supporting documents adequate for determining its costs, including any increases, under the guidelines of this report.

Upon mutual agreement, Amtrak and MTRC may modify the terms and conditions of this report and order, provided a description of any such agreement is forwarded to the Commission within 10 days of its execution.

Contentions of the parties not specifically discussed in this report have been considered and found to be without merit.

We find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered:

(1) The National Railroad Passenger Corporation, pursuant to section 402(a) of the Rail Passenger Service Act, as amended, shall pay compensation to the Minnesota Transfer Railway Company for the costs incurred by that railroad on behalf of the National Railroad Passenger Corporation in providing services and the use of tracks and facilities of the Minnesota Transfer Railway Company for the period beginning with the opening of the new terminal facility in the Minneapolis-St. Paul area and continuing until such time as the Commission shall order otherwise. Such compensation shall be computed according to the specific guidelines set out in this report.

(2) This order shall be effective 35 days from the date it is served.

APPENDIX I

The risk of liability provisions to be used to govern the operations involved in this proceeding are as follows:

Liability. (a) Amtrak agrees to indemnify and save harmless MTRC, irrespective of any negligence or fault of MTRC, its employees, agents, or servants, or howsoever the same shall occur or be caused, from any and all liability for injuries to or death of any employee of Amtrak and for loss of, damage to, or destruction of such employee's property. For the purposes of this section, officers, agents, servants, or employees of any railroad other than MTRC who are on or about the propety of MTRC for the purpose of conducting activities by or for the account of Amtrak pursuant to an agreement between Amtrak and such other railroad shall be regarded as employees of Amtrak for the purpose of this subparagraph (a).

(b) Amtrak agrees to indemnify and save harmless MTRC irrespective of any negligence or fault of MTRC, its employees, agents, or servants, or howsoever the same shall occur or be caused from any and all liability for injuries to or death of any person or passenger who has purchased an Amtrak-approved ticket for any train operated by or for the account of Amtrak, or any person on such train or on the property of MTRC for the purpose of accompanying or meeting a passenger or of attending a public function in connection with the operation of such train, and for loss of, damage to, or destruction of property of such person or passenger.

(c) Amtrak agrees to indemnify and save harmless MTRC irrespective of any negligence or fault of MTRC, its employees, agents, or servants, or howsoever the same shall occur or be caused, from any and all liability for, loss of, damage to, or, destruction of any locomotive, passenger car, or any other property or equipment owned by, leased to, used by, or otherwise in the control, custody, or possession of Amtrak.

(d) Amtrak agrees to indemnify and save harmless MTRC, irrespective of any negligence or fault of MTRC, its employees, agents, and servants, or howsoever the same shall occur or be caused, and nothwithstanding the provisions of subparagraph (f) hereof, from any and all liability for injury to or death of any person and loss of, damage to, or destruction of any property, other than persons and property specified in subparagraph (e) hereof, if such injury, death, loss, damage, or destruction arises from or is proximately caused as a result of a collision of a vehicle or a person with an Amtrak train, at the intersection of a street or road, whether public or private, and the tracks of MTRC.

(e) MTRC agrees to indemnify and save harmless Amtrak, irrespective of any negligence or fault of Amtrak, its agents, employees, or servants, or howsoever the same shall occur or be caused, from any and all liability for injury to or death of any employee or employees of MTRC and for loss of, damage to, or destruction of any property or equipment owned by, leased to, used by, or otherwise in the control, custody, or possession of MTRC or its employees, other than property described in subparagraph (c) hereof, which arises from activities conducted by or for the account of Amtrak pursuant to this agreement. In consideration of MTRC assuming the obligations described in subparagraph (e), Amtrak will compensate the railroad monthly at a rate of

(f) MTRC agrees to indemnify and save harmless Amtrak, irrespective of any negligence or fault of Amtrak, its employees, servants, or agents, or howsoever the same shall occur or be caused, from any and all liability for injury to or death of any person or persons (other than those persons, employees, or passengers described in subparagraphs (a), (b), and (d) hereof) and from any and all liability for loss, damage, or destruction to any property (other than property described in subparagraphs (a), (b), (c), and (d) hereof) which arises from activities conducted by and for the account of Amtrak pursuant to this Agreement.

(g) In case suit shall at any time be brought against either Amtrak or MTRC asserting a liability against which the other agrees to indemnify and save harmless the party used, the indemnifying party shall, at its own cost and expense and without any cost or expense whatever to the party sued, defend such suit and indemnify and save harmless the party sued against all costs and expenses thereof and promptly pay or cause to be paid any final judgment recovered against the party sued; provided, however, that the party sued shall promptly upon the bringing of any such suit against it give notice to the indemnifying party and thereafter provide all such information as may from time to time be requested. Each party shall furnish to the other all such information relating to claims made for injuries, deaths, losses, damage, or destruction of the type covered by this paragraph as such other party may from time to time request.

READEX FICHE best copy available

No. AB-18 (Sub-No. 10)

CHESAPEAKE & OHIO RAILWAY CO. ABANDONMENT OF THE POMEROY BRANCH BETWEEN OLDTOWN AND POMEROY, OHIO

Application for a certificate of public convenience and necessity permitting abandonment of the lines of portions of the Pomeroy branch and abandonment of operations over a portion of the branch between Oldtown and Pomeroy, all in Hocking, Vinton, Gallia, and Meigs Counties, Ohio, granted subject to conditions. Conditions prescribed. Issuance of a certificate withheld pending compliance with Public Law 94-210.

Rene J. Gunning for applicant.

C. Richard Grieser, Charles Moran, Cheryl K. Hachman, Bernard V. Fultz, and *Carl F. Weiffenbach* for protestants.

Decision and Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3 (Commissioners *Brown, MacFarland,* and *Clapp*), held at its office in Washington, D.C., on the 29th day of March 1977.

Upon consideration of the record in the above-entitled proceeding, including the initial decision of the Administrative Law Judge, served June 29, 1976; the exceptions filed by applicant and by the Co-Operative Legislative Committee, Railroad Brotherhoods and Railroad Unions, State of Ohio (Committee); and applicant's petition to withdraw its third exception;

It appearing, That the Administrative Law Judge approved the abandonment of the line between milepost 51.21 near Oldtown, Ohio, and milepost 69.36 near Creola, Ohio, and between milepost 78.02 near Dundas, Ohio, and milepost 110 near Kerrs, Ohio; and abandonment of operations over the line between milepost 110 near Kerrs and milepost 135.05 at the end of the line, conditioned upon service being provided by and all private sidings on the segment being opened to ConRail;

It further appearing, That the applicant alleges that the application as amended should be approved; that the potential traffic considered was speculative and without estimates of revenues; that the condition imposed requiring ConRail's operation of the Kerrs end of the line segment poses an unreasonable burden upon applicant which is beyond its power to effect and is contrary to Commission precedent since ConRail is neither an applicant nor a party to this proceeding;

It further appearing, That the initial decision did not specifically impose labor protective conditions;

It further appearing, That the environmental threshold assessment, which is part of the record herein, recommended that a condition be imposed to insure that any interested responsible party would have an opportunity to purchase all or any portion of the line for public purposes; and that such a condition should be imposed;

It further appearing, That the findings and conclusions of the Administrative Law Judge with respect to all matters of fact and law considered and disposed of in his initial decision are, in all material respects, proper and correct; that the exceptions and the reply raise no new or material fact or law, except as above noted, which have not been adequately considered and properly disposed of by the Administrative Law Judge in his report; and that the said exceptions and reply, otherwise, are not of such a nature as to require the issuance of a report discussing the evidence in light of such pleadings;

It further appearing, That the parties are advised that this decision is administratively final under the provisions of section 17(9)(c) of the Interstate Commerce Act; that any further administrative appeal can be entertained only under section 17(9)(d) of the act which permits such an appeal only if the entire Commission finds that a matter of general transportation importance is involved, that clear and convincing new evidence has been presented, or that there exist changed circumstances which would materially affect the decision made herein; and that such an appeal must be filed within 20 days of the date of service of this decision and order;

Wherefore, and good cause appearing therefor:

We find, That the evidence considered in the light of the exceptions and reply thereto does not warrant a different result from that reached by the Administrative Law Judge, that the statement of facts, the conclusions and findings, as modified herein, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own; and that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969;

It is ordered, That applicant's petition to amend its exceptions be, and it is hereby, granted;

It is further ordered, That the conditions for the protection of employees set forth in *Chicago, B. & Q. R. Co. Abandonment,* 257 I.C.C. 700 (1944), shall be, and they are hereby, imposed;

It is further ordered, That the condition requiring service by ConRail over the segment of the line between milepost 110 near Kerrs and milepost 135.05 at the end of the line be, and it is hereby, vacated and set aside;

It is further ordered, That any responsible State agency and/or local Government or other interested responsible organizations be given the opportunity, for a period of 120 days from the date the certificate is issued, to negotiate the purchase of all or any portion of the rail properties of the lines to be abandoned for public use at a purchase price on such terms as the parties may agree as just and reasonable;

It is further ordered, That the initial decision of the Administrative Law Judge, served June 29, 1976, which would approve the application, be, and it is hereby, except as herein modified, adopted, as the report of the Commission, Division 3, effective 20 days from the date of service hereof.

The statement of facts, conclusions, and finding of Administrative Law Judge William J. O'Brien follows:

By amended application filed April 8, 1974, the Chesapeake and Ohio Railway Co. (C&O) a common carrier by railroad subject to part I of the Interstate Commerce Act seeks a certificate of public convenience and necessity under section 1 (18-20) of the act permitting:

(1) abandonment of that portion of the line of its Pomeroy Branch between valuation station 85 + 99.8 at or near Oldtown, Ohio, and valuation station 1043 + 83 at or near Creola, Ohio, a distance of approximately 18.14 miles;

(2) abandonment of that portion of the line of the branch between valuation station 1501 + 21 at or near Dundas, Ohio, and valuation station 3403 + 91 at or near Gallipolis, Ohio, a distance of approximately 36.04 miles;

(3) abandonment of that portion of the line of the branch between valuation station 4347 + 46 at or near Pomeroy, Ohio, and valuation station 4508 + 40 at the end of the line near Pomeroy, Ohio, a distance of approximately 3.05 miles;

(4) abandonment of operations over a portion of the branch between valuation station 3403 + 91 at or near Gallipolis, Ohio, and valuation station 4347 + 46 at or near Pomeroy, Ohio, a distance of approximately 17.87 miles;

all in Hocking, Vinton, Gallia, and Meigs Counties, Ohio.

The application is opposed by the Ohio State Legislature Board for the Railroad Unions of Ohio (RUO), United Transportation Union (UTU), and Brotherhood of Maintenance of Way employees (MOW), American Electric Power Service Corporation (American Electric), the Public Utilities Commission of Ohio (Commission), Meigs County, and the Keener Sand & Clay Company (Keener).

The Commission, by order dated March 20, 1975, found that no environmental impact statement need be issued in this proceeding since it did not represent a major Federal action significantly affecting the quality of the human environment. The case initially assigned for handling under the modified procedure, was subsequently set for oral hearing, which was held April 7-9, 1976. Briefs were filed on May 21, 1976.

In a related application filed February 22, 1976 in Finance Docket No. 28084, C&O and the Baltimore & Ohio Railroad Company (B&O), seek authority under section 5(2) of the Interstate Commerce Act whereby B&O would lease from C&O that portion of the Pomeroy branch between valuation station 1501 + 21 at or near Dundas, Ohio, and valuation station 1043 + 80 at or near Creola, Ohio.

At the hearing a stipulation was entered into between C&O and American Electric wherein it was agreed that C&O, would at its own expense for 364 days following an order permitting abandonment as requested, to continue service over that portion of the track between Dundas and Pomeroy, Ohio.

BACKGROUND

The portion of the Pomeroy branch described in the application extends from Oldtown to the end of the line at Pomeroy, a distance of 83.84 miles serving the stations of Union Furnace, Starr, New Plymouth, Orland, Creola, McArthur, Dundas, Oreton, Hawks, Minerton, Vinton, Bidwell, Kerrs, Gallipolis, Kanauga, Cheshire, Middleport, Ambassador Siding & Pomeroy.

The line crosses the B&O at Dundas and the former Penn-Central, now ConRail, at Hobson. It includes 69.89 miles of main track, 8.20 miles of sidetrack, 94 bridges consisting of 1,948 feet of steel, and 4.543 feet of timber, 62 public grade crossings, 8 with flashing light signals, and 128 private crossings.

The industries in the area include farming, mining, and manufacturing. For the most part the record does not indicate that they are totally dependent on rail transportation. The area is served by U.S. Highway 50, and seven State highways, apparently in sound condition.

The initial application sought permission to abandon the line from Oldtown to Gallipolis, a distance of approximately 62.78 miles, as well as the 3-mile segment at Pomeroy. The application was subsequently amended to exclude the portion between Creola and Dundas which is proposed to be served by B&O under the aforesaid lease.

In the portion of the Pomeroy branch, i.e. Gallipolis to Pomeroy, where C&O seeks to retain the line but abandon operations, is included a segment, Kanauga-Hobson, over which Penn-Central Transportation (P.C.), operated, and ConRail now operates, under a trackage agreement. That this strip of track is an integral part of ConRail's only route between Columbus, Ohio and Charleston, W. Va., is indicated by the fact that of the total movement over that portion, P.C. has accounted for 95 percent of its use.

Applicant's manager of Profit Margin Research submitted evidence to the effect that the portion of the branch proposed to be abandoned showed a net railway operating deficit for the years 1973, 1974, and 1975 of $184,279, $111,573, and $187,206 respectively.

C&O assures us that it would be a very simple matter to change its switching tariff to show all sidings open to direct switching by ConRail from Kerrs to the end of the line. C&O would take such action and consider extending the trackage rights or selling the necessary segments at salvage value.

It would be feasible for ConRail to switch industries east of Hobson and west of Kanauga regardless of how distant they might be from the main line. It would not be necessary for ConRail to establish local service.

As previously noted, no shipper appeared representing the area Oldtown-Creola. Two lumber dealers at McArthur, on the segment which C&O proposes to lease to B&O, testified neither were aware of the pending application covering the lease.

The Keener Sand and Clay Company at Kerrs was represented by its secretary-treasurer. The company produces industrial sand used in foundries and is served by a private siding. It shipped 145 cars in 1974 and 137 cars in 1975. For the first quarter of 1976 it shipped 35 cars. It is totally dependent on rail service as rates on trucking sand to the markets presently served would be prohibitive. Abandonment of the business would follow an abandonment of rail service.

The O'Dell Lumber Company of Gallipolis receives 8 to 10 cars a year. It is served by the team track near the freight station. ConRail service would be satisfactory.

Gallia Roller Mills at Gallipolis received 10 cars of freight in 1974 and 17 cars in 1975. The business is growing. ConRail service would be satisfactory.

Gallipolis Reduction Company produces dry render tankage and is located 9 miles from the team track in Gallipolis. The business is growing; 34 boxcars were shipped in 1974; 74 boxcars were shipped in 1975 and the annualized movements for 1976 would be 92 boxcars. ConRail service would be satisfactory.

Meigs County Farm Bureau, located at Pomeroy receives bulk lime, nitrogen, phosphorous, and potash. The plant served farms with seed, feed, fertilizer, lime, and general farm products. Only a small percent of its traffic moves by rail. If freight rates and service were comparable, ConRail would be satisfactory.

Pomeroy Cement Block Co. at Pomeroy received an average of five cars a year since 1971. It uses a team track east of the station but could accept shipments at the station.

Central Soya of Ohio, Inc., maintains a supply warehouse in Gallipolis, merchandising animal and poultry feed, both bag and bulk, fertilizer, herbicides, and other farm materials. It anticipates a 50-percent increase in business. For the 3-year period ending August 31, the company utilized:

	Carloads	Tons	Revenue
1973	97	4,500	$45,000
1974	133	6,750	81,000
1975	81	4,050	60,750

The decrease in 1975 was due to a nationwide shortage. Since that time the company has enjoyed a remarkable recovery. In 1976 there were 14 carloads or 580 tons in the month of March alone. They will increase their space from 17,000 to 25,600 square feet, which will facilitate to a greater extent the handling of carload freight P.C. service has been fair.

Modern Poultry and Supply at Pomeroy receives two or three carloads of material a year, and leases the depot in Pomeroy.

The McNally-Pittsburgh Corporation located at Wellston, which is served by the B&O, manufacturers coal preparation plants and equipment. It is under the impression that that portion of the branch, Creola-Logan, was the only route available with sufficient clearances for oversize loads. The record shows alternate routes available.

Associated Grocers had intended to lease a warehouse 2 miles west of Gallipolis but declined to execute the lease upon learning of the abandonment plans. At least 250 cars a year or 30 percent of its business is conducted by rail. It would have transferred its business from Huntington, W. Va., a business that in the past 5 years has grown from $7 million to .$20 million annually. If the abandonment is granted, that warehouse would be without rail service.

At the time of the hearing it had not decided to move to another warehouse.

The Co-operative Legislative Committee Railroad Brotherhood and Railroad Unions, State of Ohio request imposition of conditions for the protection of employees as set forth in *Chicago, B. & Q. R. Co. Abandonment*, 257 I.C.C. 700 if the abandonment is permitted. These protective conditions will be imposed as a condition to granting the application.

DISCUSSION AND CONCLUSIONS

Briefs filed by the parties on May 21, 1976, have been fully considered. Any findings or conclusions therein sought and not hereinafter made have been found to be without merit or of such nature as to tend only to add bulk to this decision without altering it.

Section 1(18), confers upon the Commission exclusive jurisdiction to permit abandonment of branch lines whose operation and maintenance impose an undue burden on interstate commerce. The purpose of the section is to promote efficient and sound rail transportation. The Commission's function, in essence, is the balancing of the immediate and local interest of the community and the shippers against the broader public interest in freeing interstate commerce from undue burdens. Justice Brandeis described that function in this manner:

> The sole test prescribed in that abandonment be consistent with public necessity and convenience. *** The benefit to one [interstate v. interstate commerce] must be weighed against the inconvenience and loss to which the other will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce. *** The result of this weighing—the judgment of the Commission—is expressed by its order granting or denying the certificate. State of Colorado v. United States, 271 U.S. 153, 168, 46 S. Ct. 452, 70 L.Ed, 878.

In most, if not all, abandonment proceedings, the interests are in conflict. The railroad desires to cease operation usually because the line is unprofitable. The shippers and the affected communities desire retention of the existing rail service even though seldom used. Weighing these conflicts, the Commission determines the "public convenience and necessity." See *State of Nebraska* v. *United States*, 255 F. Supp. 718.

Nobody questions the propriety and necessity of discontinuing trains and abandoning branch lines which are hopeless money losers. The emphasis lies on the qualifying word "hopeless"—because, the fact is, sometimes the undertaker is called in to do his work when a conscientious doctor might still find some life. It is better business to revive a losing operation than to give it up—which is especially true in railroading because of *the importance of branch lines as feeders to the rest of the operation*. In the chainstore business or some kinds of manufacturing, perhaps this possible contribution of a losing segment to overall profit might not obtain, but it is certainly a consideration of importance on the railroads. More and more plants are being built all the time without service from railroad sidings—which is all the more reason why it is important to continue serving, if economic justification can be found, all traffic for which rail connections exist.

Initially C&O sought to abandon *the line* from Oldtown to Gallipolis, *operations* over the line from Gallipolis to Pomeroy, and the line from Pomeroy to its end. Upon further investigation and reflection it was decided that public convenience and necessity require service be maintained between Creola and Dundas. Fortunately a practical solution presents itself in the proposal to lease that segment to B&O.

The track from Oldtown to Creola measures 18.14 miles. The Dundas to Gallipolis segment measures 35.98 miles, and from Pomeroy to the end of the line is 3.05 miles or a total of 57.17 miles.

The record shows that rehabilitation costs would run approximately $10,670 a mile. And the estimated normalized maintenance following rehabilitation will approximate $4,525 per mile. The salvage value will average $12,340 per mile.

The record contains no revenue data from the line, Oldtown to Creola, and we must of necessity consider, that, treated individually, abandonment of that segment is justified. This would eliminate $193,660 in rehabilitation costs, $82,128 in estimated normalized maintenance and return $223,971 in salvage.

The next segment on the branch, Creola-Dundas will be retained, and service is proposed under the lease arrangement.

The remaining portion of the branch, Dundas to milepost 135.05, a distance of 57 miles, containing 32 miles of unproductive trackage, is written off as a losing cause by C&O, since in considering only "permanent traffic," it average 10 carloads a mile in 1974 and 11 carloads a mile in 1975.

Before concurring in this appraisal and committing the usual blunder of emptying the baby out with the bath, we should consider the fact that on the 32 miles, Dundas to Kerrs, the carload movements average 60 cars a year while on the 25 miles, Kerrs to the end of the line, 987 carloads moved in 1974, an average of 39 cars per mile. In 1975, the average dropped to 26 cars per mile.

Looking ahead, at the potential traffic, Associated Grocers, if assured of rail service, would expect to generate 250 cars a year which would escalate the average by approximately 10 cars per mile. Add to this the attractive growth figures of Central Soya, Gallipolis Reduction Company, and others, the goal of 34 carloads per mile is within reach, warranting the retention of this segment.

Abandonment of the Dundas to Kerrs segment would eliminate $341,440 in rehabilitation costs, $144,800 in estimated normalized maintenance and afford $394,880 in salvage.

Summarizing in abandoning the segments Oldtown to Creola and Dundas to Kerrs, C&O will avoid $535,100 in rehabilitation costs out of its original estimate of $608,603. It will avoid $226,929 in estimated normalized maintenance out of the estimated $258,000. It should realize in salvage $618,851 of the estimated $705,386.

If C&O continues to maintain the 4 miles from Kerrs to Gallipolis the rehabilitation costs will be $42,680 and the estimated normalized maintenance will amount to $18,100.

The segment from Pomeroy to the end of the line will cost $32,543 for rehabilitation and $13,801 for estimated normalized maintenance.

Considering the fact that ConRail succeeded to the trackage rights contract and is paying 95 percent of the costs of maintenance plus $10,000 per year, the remaining costs to C&O, particularly in the light of the prospective savings and salavage on the balance of the branch, is minimal. Its sale to ConRail of the two segments, i.e., Kerrs to Gallipolis, and Pomeroy to the end of the line, at salvage prices, as suggested by C&O, would eliminate the maintenance costs of the segments, and return $87,000 to C&O in salvage.

It is unusual in abandonment proceedings to reach a solution beneficial and acceptable to parties, the shipping public and the railroad. Throughout the hearing, witnesses for protestants, with few exceptions, were highly complimentary of the service afforded by C&O over the years. Although desirous of retaining that service, it was agreed that similar service by ConRail could satisfy their needs.

The Administrative Law Judge finds that a certificate of public convenience and necessity should be issued to C&O permitting abandonment of those portions of the branch between Oldtown and Creola, and between Dundas and Kerrs, conditioned upon service being afforded by ConRail over the segment, Kerrs to the end of the line, such service to be made feasible by C&O affording ConRail the right to serve all sidings on that segment and to afford ConRail access over the line from Kanauga to Kerrs, and Hobson to the end of the line. This may be effected by extension of the present trackage rights contract or by sale to ConRail the property west of Kanauga and east of the end of the line.

C&O has assured us that this poses no herculean problem and it would appear that ConRail should welcome added traffic off this important artery of its system. C&O has the 365 day-holding period following a grant of the necessary authority in which it can effect an agreement with ConRail and assure the public and the Commission of continued service.

ULTIMATE FINDINGS, CERTIFICATE, AND ORDER

Upon consideration of all the evidence of record, the Administrative Law Judge finds that the present and future public convenience and necessity permit the abandonment by C&O of its line of railroad extending between milepost 51.21 near Oldtown and milepost 69.36 near Creola, Ohio, and its line of railroad extending between milepost 78.02 near Dundas and milepost 119 near Kerrs, Ohio, and operations over its line of railroad between milepost 110 near Kerrs and milepost 135.05 at the end of the line conditioned upon service being afforded by ConRail on the line between milepost 110 and milepost 135.05 and that all private sidings on this segment be opened to ConRail by C&O. The application in all other respects is denied.

The Administrative Law Judge further finds that this is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. 4332, et seq.

It is ordered, That in the event any person or Government entity is considering an offer of financial assistance to enable the rail service involved to be continued, then such person or Government entity should promptly give notice that it is considering such an offer by certified mail to carrier applicant and by first-class mail to all parties of record and the Commission;

It is further ordered, That applicant railroad shall, within 10 days after receiving notice that an offer of financial assistance is being considered, make available to the party considering the offer of financial assistance the information described under the heading "Railroads Seeking Abandonment Authority," which appears in the attached Notice of the Commission entitled "Procedures for Pending Abandonment Cases," served March 31, 1976, and published on that date in the Federal Register, 41 F.R. 13691 (hereinafter called the Procedures), and such information shall be made available in the manner described in the Procedures;

It is further ordered, That upon this order becoming administratively final, notice of the finding of public convenience and necessity made herein, shall be published in the Federal Register pursuant to the requirements of section 1a(6)(a) of the Interstate Commerce Act, as amended;

It is further ordered, That, notwithstanding any notice that financial assistance is being considered that may have been given pursuant to the above ordering paragraph, any person or Government entity desiring to offer financial assistance to enable the rail service involved to be continued shall, within 15 days of publication in the Federal Register of the above-described finding of public convenience and necessity, send notification of such offer by certified mail to applicant railroad and the Commission and by the first-class mail to all parties of record, and such notification shall include the terms and information described under the heading, "Persons Offering Rail Service Assistance," which appears in the Procedures;

It is further ordered, That if the Commission finds that a financially responsible person has offered financial assistance in accordance with the Procedures, the Commission shall postpone the issuance of a certificate of abandonment for such reasonable time, not to exceed 6 months, as is necessary to enable such person or Government entity to enter into a binding agreement with the applicant railroad to provide financial assistance for continued rail service or to purchase the rail line;

It is further ordered, That when the Commission is informed of the execution of any financial assistance agreement or acquisition and operating agreement, the issuance of the certificate of abandonment shall be postponed for such period of time as such an agreement (including any extensions or modifications) is in effect;

It is further ordered, That all correspondence to the Commission with respect to offers of financial assistance for the continued operations or acquisition of the subject line shall contain an appropriate reference to the subject proceeding; and that on the lower left-hand corner of envelopes containing such correspondence the following notation shall be typed in boldface "AB-RESCP;"

It is further ordered, That subject to the conditions set forth above, an appropriate certificate of abandonment shall be issued, and the applicant shall not effect any abandonment of discontinuance of service prior to the effective date of such certificate of abandonment.

It is further ordered, That following the issuance of an appropriate certificate of abandonment for a period of 365 days following the effective date of the Commission's order issuing the certificate, C&O will maintain its line from Dundas to Pomeroy in the same state of repair prevailing on the effective day of said order and provide train service thereover no less frequently than that provided in the week prior to the effective date of said order of the Commission.

And it is further ordered, That this order shall be effective 20 days from the date of service in the absence of an appeal or of a stay by the Commission.

Dated at Washington, D.C., this 18th day of June 1976.

354 I.C.C.

DOCKET NO. AB-36 (SUB-NO. 2)

OREGON SHORT LINE RAILROAD AND THE UNION PACIFIC RAILROAD COMPANY—ABANDONMENT PORTION GOSHEN BRANCH BETWEEN FIRTH AND AMMON, IN BINGHAM AND BONNEVILLE COUNTIES, IDAHO

Decided May 10, 1978

On further consideration, the employee protective conditions imposed in the prior report, modified. Imposition of employee protective conditions in abandonment proceedings under section 1a of the Interstate Commerce Act discussed.

Joseph D. Anthofer for Oregon Short Line Railroad Company and Union Pacific Railroad Company.

Michael E. Roper and *W. A. Thie* for Missouri-Kansas-Texas Railroad Company.

William F. Adams, Charles W. Burkett, and *Louis P. Warchot* for Southern Pacific Transportation Company.

Harry J. Breithaupt, Jr., and *James I. Collier, Jr.,* for the Association of American Railroads.

John O'B. Clarke, Jr., and *William G. Mahoney* for Railway Labor Executives' Association.

DECISION OF THE COMMISSION ON FURTHER CONSIDERATION

BY THE COMMISSION:

By application filed April 9, 1974, under section 1(18-20) of the Interstate Commerce Act (act), the Oregon Short Line Railroad Company (Oregon Short Line) seeks a certificate of public convenience and necessity authorizing it to abandon its line of railroad which extends from milepost 0.06 near Firth in a northeasterly direction to milepost 17.53 near Ammon, a distance of 17.53 miles, in Bingham and Bonneville Counties, Idaho. By the same application, the Union Pacific Railroad Company (Union Pacific) seeks authority to abandon operation over the line.

By report and order dated January 28, 1977, Review Board Number 5 found that subject to certain conditions, the public convenience and necessity permitted the abandonment of the line and operations over it. To provide employee protection, the review board imposed the *Burlington* conditions,[1] as supplemented by section 405 of the Rail Passenger Service Act (45 U.S.C. 565), hereafter section 405 of the RPSA.

On March 9, 1977, applicants filed a petition seeking reconsideration of the employee protective conditions imposed by the review board. By report and order served August 18, 1977,[2] division 3 modified the conditions imposed by the review board and imposed the employee labor protection enacted in and developed pursuant to section 405 of the RPSA. In this report we shall refer to those conditions as Appendix C-1 or the Appendix C-1 conditions, although the prior report referred to them as "the Section 405 Agreement."

The prior report concluded that Appendix C-1 was the level of employee protection envisioned by the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act) and that it should be applied, without modification, to abandonment proceedings filed under section 1a(4) of the act. The prior report also concluded that the Commission could exercise its discretion and impose the same protection in pending abandonments which were filed under section 1 of the act prior to November 1, 1976. See *I.C.C.* v. *Railway Labor Ass'n*, 315 U.S. 373 (1942).

The division provided for publication of a synopsis of its report in the Federal Register. Because of the significance of the decision in the prior report, all railroads and employee representatives were offered an opportunity to intervene and present their arguments by written comments. Comments were filed jointly by the applicants, and individually by the Missouri-Kansas-Texas Railroad Company (MKT), the Southern Pacific Transportation Company (Southern Pacific), the American Association of Railroads (AAR), and the Railway Labor Executives' Association (RLEA).

The comments are divided into two major categories—those comments addressed to the conditions adopted in the prior report and those addressed to the propriety of applying the conditions we adopt for imposition in abandonments filed under section 1a(4) to pending abandonment proceedings filed prior to November 1, 1976.

Arguments addressed to the propriety of the conditions.—AAR objects to the imposition of Appendix C-1 in any abandonment proceeding. It contends that section 1a(4) does not intend for the scope of employee protection to be as broad as the Commission indicated in the prior report. AAR does not agree that section

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[1] *Chicago, B. & Q. R. Co. Abandonment*, 257 I.C.C. 700 (1944).

[2] *Oregon Short Line R. Co.—Abandonment—Goshen*, 354 I.C.C. 76 (1977).

1a(4)'s reference to section 405 of the RPSA requires Appendix C-1. On the contrary, AAR believes that the reference only requires conditions that will provide protection in the five specific categories noted in section 405.[3] AAR asserts that the Commission itself reached the same conclusion in *Missouri Pac. R. Co.—Merger—T&P and C&EL,*[4] where the Commission concluded that Congress intended no significant changes in the level of protection. In addition, it claims House Report No. 94-725[5] indicates Congress did not intend to require a significant change.

AAR also asserts that the Commission misjudged the protection required by section 1a(4)'s reference to section 5(2)(f). AAR believes, contrary to RLEA, that the reference only requires the statutory minimum required under 5(2)(f), not the levels developed by the Commission in the exercise of its discretion. AAR then lists the specific sections of Appendix C-1 that are unnecessary under its interpretation. It claims the statute will be satisfied if the Commission imposes the *Burlington* conditions with certain modifications.[6]

MKT is also concerned with the propriety of the Appendix C-1 conditions. This carrier believes that the notice provision of Appendix C-1 is unnecessary and that the negotiation provision is inappropriate.

RLEA is also dissatisfied with the employee protective conditions adopted by the prior report. It claims that some of Appendix C-1's provisions are unnecessary and that some of the language is irrelevant and confusing. RLEA also asserts that Appendix C-1 does not provide the full measure of protection required by the 4R Act because no protection equal to sections 4 and 5 of the Washington Job Protection Agreement (WJPA) is included. (RLEA argues that sections 4 and 5 of the WJPA are necessary to insure that the protection is not less than that imposed under section 5(2)(f) of the act.) RLEA suggests that the Commission lacks the expertise to formulate proper employee protection and that management and labor should be required to negotiate a proper agreement.

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[3] Section 405 requires provisions "necessary for (1) the preservation of rights, privileges, benefits (including continuation of pension rights and benefits) to *** employees under existing collective bargaining rights and otherwise; (2) the continuation of collective bargaining rights; (3) the protection of *** individual employees against a worsening of their positions with respect to their employment; (4) assurances of priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs.

[4] 348 I.C.C. 414, 427 (1976).

[5] 94th Cong., 1st Sess. (1975).

[6] AAR suggests modifying the *Burlington* conditions by adding language equivalent to article II and paragraphs 2 and 3 of article I of Appendix C-1. It claims this protection would satisfy section 1a(4) of the act.

Arguments addressed to applying the conditions to pre-4R Act abandonments.—Several of the parties[7] claim that the Commission erred in applying the Appendix C-1 conditions to abandonment applications filed before November 1, 1976. They claim that Congress did not intend section 1a(4) protections to apply to abandonments filed prior to November 1976 and that previous Commission decisions have in fact recognized that fact.[8] The parties assert that the handling of the employee protection issue has been inconsistent in abandonment cases, and that the decision is diametrically opposed to a determination made in *Abandonment of R. Lines Discontinuance of Serv.*, 354 I.C.C. 129 (1976). They argue that since the Commission stated in that proceeding that it would develop appropriate employee protection on a case-by-case basis, it is improper to announce a different policy in an adjudicatory proceeding because it would have the effect of repealing a determination made in a rulemaking proceeding.

Finally, many of the parties claim the prior report misinterpreted *I.C.C* v. *Railway Labor Ass'n, supra.* They agree that the case upholds the Commission's discretionary power to impose appropriate employee protection in abandonments. However, they claim that the protection imposed must be based on appropriate evidence of record. Certain of the parties then assert that (1) no such evidence is present in the instant proceeding because the parties agreed on the *Burlington* conditions, and (2) there is no evidence of record indicating why this case and other pending abandonments filed under sections 1(18-20) are different from those already decided.

RLEA supports the imposition of section 1a(4) protection although, as noted above, it does not agree that Appendix C-1 provides appropriate protection. It believes the Commission's decision in the prior report was a proper exercise of discretion, that the approach is consistent with congressional intent, and that it will provide fair and uniform treatment of railroad employees.

Discussion and Conclusions

We have examined the prior report and the comments of the parties, and we believe that four areas need further discussion. We must determine if the prior report was correct in stating that Appendix C-1 is the applicable level of protection envisioned by the 4R Act. If Appendix C-1 was the level of protection mandated by Congress, we must determine if Appendix C-1 encompasses the level of protection developed pursuant to section 5(2)(f) prior to its amendment by the 4R Act. We will also consider whether Appendix C-1 can or should be adopted verbatim or whether it should be modified. Finally, we must review the prior determination that the new protective conditions shall be applied in pending abandonment proceedings filed prior to November 1, 1976.

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[7] Oregon Short Line, Union Pacific, Southern Pacific, MKT, and AAR. The various arguments of these parties have been consolidated under this section.

[8] See, for example, No. AB-1 (Sub-No. 27), *Chicago and North Western Transportation Company Abandonment Between Somers and Carroll, Iowa*, served March 2, 1977.

Section 1a(4) requires the Commission to impose provisions for the protection of the interests of employees in any certificates of abandonment issued under its provisions. It requires those provisions to be at least as beneficial to the interests of employees as the provisions formerly established pursuant to section 5(2)(f) of the act and pursuant to section 405 of the RPSA.

AAR interprets the statutory language as requiring only minor modifications of existing levels of protection. It believes that the appropriate standards consist of the statutory minimums of former section 5(2)(f) with additions to cover the areas in section 405(b) of the RPSA. AAR believes it finds support in the House Report on the 4R Act and in our language in *Missouri Pac. R. Co.—Merger—T&P and C&EI, supra.*

We believe section 1a(4) was designed to provide minimum levels of employee protection similar to those contained in Appendix C-1. Both amended section 5(2)(f) and new section 1a(4) require employee protection at least as beneficial as the protection established "pursuant to" section 405 of the RPSA. "Pursuant " is defined as "in accordance with," and it is difficult to see how this could be interpreted to mean the standards specified *in* section 405(b). If Congress had intended that approach, it almost certainly would have used language requiring the protection "in" the section. And in fact, an early House draft of the 4R Act included a section 401(b) which was to amend section 1(20) of the act. Proposed section 401(b) would have required the Commission to "impose a fair and equitable arrangement for the protection of employees containing benefits no less than those established pursuant to section 5(2)(f) *** and *section 405(b) of the Rail Passenger Service Act.*" (Emphasis supplied.) Report of the Committee on Interstate and Foreign Commerce on the Rail Revitalization and Regulatory Reform Act of 1975, H.R. Report No. 725, *supra*, p. 16.

The legislative history cited by AAR refers to the House draft which cites section 405(b) of the RPSA and differs markedly from the statutory language.

Contrary to AAR, we believe the legislative history indicates that Congress did intend to change the level of employee protection by its enactment of the 4R Act. The 1975 House draft not only contained the previously mentioned proposed amendment to section 1(20), but also contained a proposed amendment to section 5(2)(f). The proposed amendment to section 5(2)(f) contained the adopted language, i.e., developed pursuant to section 405 of the RPSA. Thus, it seems clear Congress intended to distinguish between "developed pursuant to section 405" and "developed pursuant to section 405(b)." See H.R. Report No. 725, *supra*, p. 19. And, since section 405 is broader than section 405(b), more of a change is required by "developed pursuant to section 405."

Congress was aware of the scope of the various types of employee protection including attrition conditions, the Appendix C-1 conditions, and the *New Orleans* (*New Orleans Passenger Terminals Case*, 282 I.C.C. 271), *Burlington*, and *Oklahoma* conditions. It knew that the arrangments for employee protection imposed in consolidations were generally more extensive than those imposed in abandonments. See, Hearings Before the Sub-Committee on Transportation and Commerce of the Committee on Interstate and Foreign Commerce House of Representatives on H.R. 6351 and H.R. 7681, H.R. Report No. 38, 94th Cong., 1st Sess. (1975) pp. 382, 594-7. When Congress adopted the section 405 language it meant more than the protection of section 405(b). It meant the protection developed *pursuant* to section 405 of the RPSA. The prior report indicated that Appendix C-1 is the protection developed pursuant to section 405 of the RPSA and that finding has not been challenged.

Nothing we said in the preceding discussion conflicts with what we said in *Missouri Pac. R. Co.—Merger—T&P and C&EI, supra.* In that case we stated that Congress did not intend to have the Commission significantly change its policy in the section 5(2)-employee protection area. However, the statement indicated that, contrary to the position taken by the Administrative Law Judge, Congress did not intend to significantly change policy and require imposition of attrition conditions.

RLEA claims that, contrary to the findings of the prior report, Appendix C-1 is less beneficial to employee interests than the protection developed under section 5(2)(f). It asserts that the protection of sections 4 and 5 of the WJPA,[9] which are not parts of Appendix C-1, are necessary because such protection was formerly imposed pursuant to section 5(2)(f) of the act and equivalent protection is not included in Appendix C-1.

First, we disagree with the assertion that sections 4 and 5 are an essential part of section 5(2)(f) protection. Those sections have customarily been imposed where coordination projects between two carriers were involved. They have not been imposed in all section 5(2) transactions. In trackage rights cases the *Oklahoma*[10] conditions, which do not contain the provisions of sections 4 and 5 of the WJPA, have been the rule. Thus, sections 4 and 5 of the WJPA have not been imposed in all section 5(2) transactions. In fact, they have only been imposed in those situations where we found them necessary, usually where a consolidation of seniority rosters between two or more carriers was involved. Those sections are not an essential part of the protection developed under section

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[9] The applicable sections are as follows:

Section 4. Each carrier contemplating a coordination shall give at least ninety (90) days written notice of such intended coordination by posting a notice on bulletin boards convenient to the interested employees of each such carrier and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be effected by such coordination, including an estimate of the number of employees of each class affected by the intended changes. The date and place of a conference between representatives of all the parties interested in such intended changes for the purpose of reaching agreements with respect to the application thereto of the terms and conditions of this agreement, shall be agreed upon within ten (10) days after the receipt of said notice, and conference shall commence within thirty (30) days from the date of such notice.

Section 5. Each plan of coordination which results in the displacement of employees or rearrangement of forces shall provide for the selection of forces from the employees of all the carriers involved on bases accepted as appropriate for application in the particular case; and any assignment of employees made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employees affected, parties hereto. In the event of failure to agree, the dispute may be submitted by either party of adjustment in accordance with Section 13.

Also relevant are:

Section 1. That the fundamental scope and purpose of this agreement is to provide for allowances to defined employees affected by coordination as hereinafter defined, and it is the intent that the provisions of this agreement are to be restricted to those changes in employment in the Railroad Industry solely due to and resulting from such coordination. Therefore, the parties hereto understand and agree that fluctuations, rises and falls and changes in volume or character of employment brought about solely by other causes are not within the contemplation of the parties hereto, or covered by or intended to be covered by this agreement.

Section 2(a). The term "coordination" as used herein means joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities.

[10] *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177 (1944).

5(2)(f) in every situation and, they are not necessary in abandonment proceedings, especially in light of the protection provided by Appendix C-1.

In *Congress of Railway Unions* v. *Hodgson*,[11] RLEA argued that section 405 of RPSA required the inclusion of sections 4 and 5 of the WJPA in Appendix C-1. The court examined the specific outline of the RPSA, which required a 6-month period between the date the legislation was effective and the startup of the national passenger system, and concluded that the provisions for prior notice and negotiations contained in sections 4 and 5 of the WJPA were incompatible with the time frames established for the startup of the system. The court further concluded that the protection of sections 4 and 5 was unnecessary in light of the guarantees contained in other sections of Appendix C-1. Specifically, the court found that the Appendix C-1 conditions provided for notice, negotiation, and arbitration as in the WJPA. The court upheld the agreement and noted that Appendix C-1 fully protects employee by providing that any employee improperly displaced, dismissed, or reassigned will be made whole and found that no employee could be adversely affected by the procedure contained in Appendix C-1.

The rationale of the *Hodgson* decision applies equally in the case of abandonments under section 1a(4). The abandonment process mandated by the 4R Act emphasizes the timely disposition of abandonment proceedings and provides for financial assistance proposals. The congressional purpose behind the abandonment provisions of the 4R Act is to expedite the abandonment of unnecesary lines. That purpose could be thwarted by the provisions of sections 4 and 5 which require notice and negotiation of implementing agreements before the abandonment of the lines and reassignment of work. The provisions of Appendix C-1 provide ample protection for employees who may be adversely affected and, at the same time, speed the abandonment process. Section 4 and 5 of the WJPA are not ordinarily necessary in abandonment proceedings or in trackage rights or other joint uses of facilities, absent evidence that some form of coordination of rosters between two or more carriers will be involved. The negotiation, and arbitration provisions noted by the *Hodgson* court provides the necessary protection.

MKT suggests we eliminate the notice procedure outlined in paragraph 4 of article I of Appendix C-1 because it believes the notice of intent to abandon required by section 1a of the act and our regulations[12] is sufficient. The notice of intent to abandon contains only the proposed labor protective conditions. The notice provisions of paragraph 4 are much more extensive. The Appendix C-1 provisions require that the notice contain an adequate statement of the proposed changes including an estimate of the number of employees of each class that will be affected and that the notice be posted on bulletin boards convenient to interested employees and sent by registered mail to the employee's representatives. We believe the notice provisions of Appendix C-1 are required so that affected employees will be likely to receive notice of how the transaction will affect them.

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[11] 326 F. Supp. 69 (D. D.C. 1971).

Many of the parties have challenged our verbatim application of Appendix C-1 to abandonment proceedings. In particular, RLEA states that Appendix C-1 contains numerous irrelevant references to Amtrak transactions and, as such, is totally inappropriate for application in abandonments. It claims article I, sections 1a, b, c and all of article III contains numerous irrelevancies.

Upon examination of the exact text of Appendix C-1, we are convinced that the problem of inappropriate language is not insurmountable as stated by RLEA, and that Appendix C-1 can be adopted to an abandonment, trackage rights or joint-use arrangement, with minor modifications. As relevant to abandonments, the modifications are detailed in the appendix to this report. Appendix C-1 is in many respects an exact copy of the standard wording contained in the *Oklahoma* and *Burlington* conditions. See *Oklahoma Ry. Co. Trustees Abandonment, supra,* 197-201; and *Chicago, B. & Q. Co. Abandonment, supra,* 704-708.

The reference to "transaction" in sections 1a, b, and c of article I of Appendix C-1 would appear to create confusion. Paragraph 1a defines transaction as "a discontinuance of Intercity Rail Passenger Service pursuant to the provisions of the Act." If "transaction" in Appendix C-1, article I, section 1a, were redefined as "an abandonment or discontinuance pursuant to section 1a of the Interstate Commerce Act," it would not be difficult to integrate Appendix C-1 in abandonment proceedings. In the remaining sections of article I, there are no references to Intercity Rail Passenger Service or other phrases which would result in confusion if Appendix C-1 were applied to abandonment proceedings, or for that matter, other types of Commission proceedings. Paragraph 4 concerning notice contains some references which could be clarified. The references to May 1, 1971, refer solely to the startup of Intercity Rail Passenger Service and have no relevance to abandonments; also the phrase "if railroad contemplates a transaction on May 1, 1971, it shall give notice as soon as possible after signing this Agreement, prior to May 1, 1971," should be deleted since it has no present relevance.

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[12] See 49 CFR 1121.31.

RLEA is correct when it states that article III concerning employees of separately incorporated terminal companies is of no relevance, as is the reference to this article in article I, section 4 concerning notice. Article III will be deleted. Article IV states that employees who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under the terms and conditions of the body of Appendix C-1. This is appropriate. However, the second paragraph of the article makes reference to application for enforcement of the provision by the Secretary of Labor if the dispute cannot be settled by the parties within 30 days. This is inappropriate within the context of proceedings before the Commission. Instead reference will be made to the availability of arbitration for this class of employees in the event of a dispute.

RLEA has requested that a conference between railroad management and labor be held under Commission auspices to develop conditions that would be appropriate in abandonment proceedings. It has suggested that Appendix C-1 is inappropriate and that the Commission is ill-equipped to develop employee protective conditions on its own. We reject RLEA's suggestions. A comparison of the comments of RLEA and AAR in this proceeding indicates the great distance between those representatives of management and labor on the intent of Congress in enactment of section 1a(4) and the amendment of section 5(2)(f). While AAR envisions these changes as making only minor modifications in the *Burlington* conditions, RLEA believes Congress envisioned the full scope of Appendix C-1, with a supplemental requirement of extensive notice and implementing agreements in transactions involving only one carrier. Discussion of these widely variant positions would hold little promise of success and would not guarantee that the negotiated settlement would satisfy statutory minimums. The minor changes in Appendix C-1, which we previously detailed, will be more than adequate to give both railroad labor and management a firm foundation for implementation of employee protection in abandonments under section 1a.

Finally, RLEA has suggested that this Commission is ill suited to develop employee protective conditions. We emphatically disagree with this statement. We have a demonstrated expertise in developing and assessing protective conditions. See *Chicago, B. & Q. R. Co. Abandonment, supra*; *New Orleans Passenger Terminals Case, supra; Oklahoma Ry. Co. Trustees Abandonment, supra*; *Great Northern Pac.—Merger—Great Northern*, 331 I.C.C. 228 (1967). And it is well known that the Commission has been and continues to be, involved with disputes arising out of the implementation of employee protective conditions. See *Leavens* v. *Burlington Northern*, 348 I.C.C. 962 (1977).[13] In this proceeding, we are doing what we have done in other cases—developing appropriate protective conditions with the aid of comments of interested parties.

One final issue has been raised by the comments. Many of the railroad parties have objected to the prior report's conclusion to impose the increased level of protection in all pending abandonment cases filed under the old regulations and section 1 of the act.

Those parties assert that the *Railway Labor* case, *supra*, requires any protection to be based on the specific facts in each case. They claim the prior report failed to base the conditions imposed on any evidence of record and that there is no evidence bearing on the issue in the record.[14] They also believe section 1a(8) of the act expresses congressional intent to delay implementation of all provisions of section 1a other than the subsidy provisions. In fact, some of the railroad parties cite nonprint division cases that agree with their interpretations. They also believe that imposing the new conditions in pending abandonments will be unfair because the *Burlington* conditions were imposed in some cases filed around the same time and already decided.

In the *Railway Labor* case the court said that whether conditions should be imposed and "their nature and extent, are questions for the Commission to decide in light of the evidence."[15] But the court's finding is merely a statement that any action must be based on the evidence of record. We do not believe it requires specific evidence to support a finding that the particular standard we impose, is necessary, especially if it is our recognized minimum standard.

We have imposed the *Burlington* conditions as a general rule in most abandonment cases unless the facts showed a lesser or greater standard was required. The parties are aware of the fact that we have imposed standard labor protection in most cases. That policy came about because of the belief that employee morale required some protection because in most cases a substantial portion of the savings a carrier gains from an abandonment are at the expense of employees. We see no reason to change it.

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[13] We are aware that the overwhelming majority of disputes concerning employee protection are handled under the arbitration provisions of the employee protective conditions imposed.

[14] Management and labor agreed to imposition of the *Burlington* conditions in this particular case.

[15] 315 U.S. 373, 380.

We do not believe section 1a(8) prevents us from changing the minimum level of protection for cases filed under section 1. Section 1a(8) addresses itself only to the sections of the 4R Act that became immediately effective. It does not prohibit us from exercising our discretion and imposing a higher level of employee protection in section 1 abandonments. Nor do the previously decided cases indicating that the ***Burlington*** conditions are proper, prevent a change of the standard protective conditions.

We are aware that the new protection need not be adopted for imposition in section 1 cases. However, we believe section 1a(4) indicates a new national policy regarding the level of employee protection needed in these cases. After reviewing in general the area of employee protection, we reach the conclusion that a new protection should be established and that it should be imposed in all pending abandonments.

The ***Burlington*** conditions were formulated in 1944. They have never been updated. But since 1944, employees have won greater benefits in many instances. For example, Appendix C-1 provides for a 6-year protective period, and although it is not our policy to impose it on our own, lifetime attrition has often been negotiated for application in certain situations.[16] In addition, adjustments in benefits to reflect subsequent general wage increases have become more frequent. We believe the protection we generally impose should reflect the increased benefits gained by railroad labor. These facts, along with the higher protection required by sections 1a(4) and 5(2)(f) convince us that we should increase our standard level of protection for pending section 1 abandonments.

We have decided to apply the new protection in all pending abandonments because the crucial date for employee effect is the date the abandonment takes place, not the date the application is filed. We believe the 4R Act's employee protection standard should benefit employees affected by transactions consummated after passage of the act. As division 3 stated in its previous report, this action will insure fair and equitable treatment of similarly situated employees.

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[16] *Great Northern Pac.—Merger—Great Northern*, 331 I.C.C. 228 (1967); and *Chesapeake & O. Ry. Co.—Control—Western Maryland Ry. Co.*, 328 I.C.C. 684 (1967). See also Title V of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 777).

This decision should not place an undue burden on any carriers involved. Changes in policy and in the law are generally applied to proceedings in progress, unless doing so will materially prejudice the rights of a party.[17] Here, we are prejudicing no party's rights.

Carriers have never had a right to have specific protective conditions imposed. They have had a right to abandon line only if authorized and subject to the protective conditions we imposed. *I.C.C.* v. *Railway Labor Ass'n, supra.*

We affirm division 3's decision to impose these conditions in all presently pending abandonments. These conditions shall, therefore, be applied to all abandonments pending before this Commission on August 18, 1977, the service date of the prior report.

For the purpose of this decision, abandonments will be deemed to be presently pending when an administratively final decision, as defined in section 17(9)(h) of the act, had not been rendered as of August 18, 1977. If an abandonment was originally decided by a body other than the Commission or a duly designated division, and no appeal was filed to the decision that case would be administratively final on the effective date of the order. Cases in which judicial review is sought will be deemed to have been administratively final upon service of the initial administratively final decision.

In this manner we will give prospective application to our decision. At the same time, we will not be required to reopen the abandonment cases which were finally decided before service of the prior report. We will also be able to eliminate inconsistent treatment of parties by applying the protection to all cases pending on August 18, 1977.

We do not find an action in this proceeding to be inconsistent with the conclusion regarding employee protection reached in *Abandonment of R. Lines & Discontinuance of Serv.*, 354 I.C.C. 129 (1976). In that proceeding, we determined that proper conditions could not be developed on the record in that proceeding and decided to determine which conditions were appropriate on a case-by-case basis.

The cases decided after *Abandonment of R. Lines,- supra*, convinces us that we should change our standard employee protective conditions. We proceeded by adjudication rather than rulemaking, a decision within our discretion,[18] because of the need to maintain flexibility in the conditions we may impose.

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[17] As we noted earlier, we do not believe section 1a(8) prevents us from changing the protection in pending cases. We believe it speaks to those sections of the 4R Act which must be given immediate effect. Thus, we may give the policy change immediate effect.

Contrary to the situation in *Abandonment of R. Lines, supra,* we have a fully developed evidentiary record based on comments by carriers and employee representatives. Our previous objection—lack of a proper record—is not present in this case. Thus, we do not believe we abused our discretion by proceeding by adjudication.

The decision we reached in this case does not mean that a greater level of protection may not be imposed where it is warranted by the facts in a particular proceeding. Neither does it prohibit us from imposing a lesser standard where that decision is within our discretion. This decision only establishes the usual standard for employee protection that shall be imposed in abandonments.

COMMISSIONER GRESHAM, dissenting in part:

In most respects, I am in complete agreement with the majority. However, I would not impose the new protection in abandonment applications filed before February 5, 1976, the date of enactment of the 4R Act. In addition to *Oregon Short Line,* there are approximately 34 abandonment cases filed before February 5, 1976 and pending as of August 18, 1977. Seven of these were filed more than two years before the 4R Act became law. Delays in processing these applications are attributable to the Commission itself. See generally *Harlem Valley Transportation Ass'n* v. *Stafford,* 500 F. 2d 328 (2d Cir., 1974). It is unjust to penalize the carriers by imposing the new protection in such cases.

In *Oregon Short Line,* Railway Labor Executives' Association willingly agreed to the *Burlington* conditions. It elected not to file a verified statement in opposition to the application. When the applicants sought reconsideration of the Review Board's report, Railway Labor Executives' Association remained silent. Even now, Railway Labor Executives' Association's comments on the Appellate Division 3 report can be fairly read to concern only those applications filed between February 5, 1976 and November 1, 1976. In short, the majority is granting relief which Railway Labor Executives' Association never sought. In doing so, it is rejecting the sound advice of our staff.

To the limited extent that the majority differs, I respectfully dissent.

Commissioner Stafford, dissenting:

While the Amtrak conditions are the latest expression of Congressional policy, Section 1a(8) of the act indicates clearly that Congress did not intend to apply that policy to proceedings pending at the time of enactment. The protective conditions set forth in *Chicago, B. & Q. R. Co. Abandonment*, 257 I.C.C. 700 (1944), are appropriate and should be imposed.

Commissioner Murphy not participating.

It is ordered:

(1) That conditions for the protection of employee set forth in the appendix to this decision are imposed in this proceeding.

(2) Except as modified by this report and order, the order in this proceeding dated July 22, 1977, shall remain in full force and effect.

(3) This order shall be effective 30 days from the date it is served.

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[18] *Atchison, T. & S.F. Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973); *Securities & Exchange Commission* v. *Chanery*, 332 U.S. 194 (1947).

APPENDIX

Article I

1. Definitions.—(a) "Transaction" means an abandonment or discontinuance pursuant to section 1a of the Interstate Commerce Act.

(b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that there shall be no duplication or pyramiding of benefits to any employees, and, provided further, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits.

4. When a railroad contemplates a transaction, it shall give at least twenty (20) days' written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be effected by such transaction, including an estimate of the number of employees of each class affected by the intended changes.

At the request of either the railroad or representatives of such interested employees, negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix shall commence immediately and continue for not more than twenty (20) days from the date of notice. Each transaction which will result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of the twenty-

(20-) day period there is a failure to agree, the negotiations shall terminate and either party to the dispute may submit it for adjustment in accordance with the following procedures:

(a) Within five (5) days from the termination of negotiations, the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee, then the National Mediation Board shall immediately appoint a referee.

(b) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(c) The decision of the referee shal be final, binding, and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(d) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

Notwithstanding any of the foregoing provisions of this section, at the completion of the twenty- (20-) day notice period the railroad may proceed with the transaction, provided that all employees affected (displaced, dismissed, rearranged, et cetera) shall be provided with all of the rights and benefits of this appendix from the time they are affected through to expiration of the seventy-fifth (75th) day following the date of notice of the intended transaction. This protection shall be in addition to the protection period defined in article I, paragraph (d). If the above proceeding results in displacement, dismissal, rearrangement, et cetera other than as provided by the railroad at the time of the transaction pending the outcome of such proceedings, all employees affected by the transaction during the pendency of such proceedings shall be made whole.

5. Displacement allowances.—(a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

6. Dismissal allowances.—(a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and railroad shall agree upon a procedure by which railroad shall be currently informed of the earnings of such employee in employment other than with railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, or failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon employment rights of other employees under a working agreement.

7. Separation allowance.—A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

8. Fringe benefits.—No employee of the railroad who is affected by a transaction shall be deprived during his protective period of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, relief, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active service or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

9. Moving expenses.—Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and

who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not to exceed 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for a reasonable time hereafter and the ways and means of transportation to be agreed upon in advance by the railroad and the affected employee or his representatives; provided, however, that changes in place of residence which are not a result of the transaction, which are made subsequent to the initial change or which grow out of the normal exercise of seniority rights, shall not be considered to be within the purview of this section; provided further, that the railroad shall, to the same extent provided above, assume the expenses, et cetera for any employee furloughed within three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provisions of this section unless such claim is presented to railroad within 90 days after the date on which the expenses were incurred.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. Arbitration of disputes.—(a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by railroad, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. Losses from home removal.—(a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective period as a result of the transaction and is therefore required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are made subsequent to the initial changes caused by the transaction and which grow out of the normal exercise of seniority rights, shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employees, or their representatives, and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position

comparable to that which he held when terminated or furloughed, even though in a different craft or class, on the railroad which he is, or by training or retraining physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or retraining is requested by such employee, the railroad shall provide for such training or retraining at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under sections 1 or 2 of this article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

ARTICLE IV

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established pursuant to section 5(2)(f) of the Interstate Commerce Act. In so doing, changes in wording and organization from arrangements earlier developed under section 5(2)(f) have been necessary to make such benefits applicable to transactions as defined in article I of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act and pursuant to section 405 of the Rail Passenger Service Act.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.

FINANCE DOCKET NO. 28387

NORFOLK AND WESTERN RAILWAY COMPANY—TRACKAGE RIGHTS—BURLINGTON NORTHERN, INC.

Decided June 6, 1978

On administrative review, prior order of Review Board Number 5, served September 13, 1977, which approved the transaction, affirmed. Employee protection modified as set forth in the appendix to this decision.

John S. Shannon, Donald M. Tolmie, and *James C. Bishop, Jr.* for applicant.

William G. Mahoney and *John O'B. Clarke, Jr.* for protestants.

REPORT OF THE COMMISSION ON RECONSIDERATION

DIVISION 1, ACTING AS AN APPELLATE DIVISION, COMMISSIONERS BROWN, GRESHAM, AND CHRISTIAN

BY DIVISION 1:

By petition filed October 3, 1977, the Railway Labor Executives' Association (RLEA)[1] seeks administrative review of the order of Review Board Number 5 served September 13, 1977. The reply of the Norfolk and Western Company (N&W), filed October 24, 1977, also proposes modification of the order. Both the petition and the reply are addressed to the issue of the appropriate employee protective conditions that should be imposed in trackage rights cases filed under section 5(2) of the Interstate Commerce Act (the act), as amended by the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act).

The review board imposed the conditions for protection of employees discussed in *Oregon Short Line R. Co.—Abandonment—Goshen,* 354 I.C.C. 76 (1977), in order to comply with the mandate of amended section 5(2)(f) of the act, which requires employee protective conditions that will be no less protective of the interests of employees than the conditions imposed pursuant to prior section 5(2)(f) and the conditions established pursuant to section 405 of the Rail Passenger Service Act.

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[1] A late-filed petition submitted by the Brotherhood of Locomotive Engineers was rejected.

RLEA alleges that the *Oregon Short Line* conditions are deficient because they fail to provide the level of protection formerly imposed under old section 5(2)(f). Applicant notes that none of its employees will be adversely affected by its use of and operation under the trackage rights, and that it will not take exception to whatever conditions are imposed. N&W asserts its position on the issue of proper employee protection. N&W claims that the Oklahoma[2] conditions, modified as it proposes, would provide an adequate level of protection and would meet the statutory requirements.

DISCUSSION AND CONCLUSIONS

Review Board No. 5 relied on our decision in *Oregon Short Line* when it imposed employee protective conditions in this case. In *Oregon Short Line* we found that the arrangement for the protection of employees negotiated between the National Railroad Passenger Corporation and various railway employee representatives and approved by the Secretary of Labor on April 17, 1971 (commonly known as the Appendix C-1 conditions), was the arrangement established pursuant to section 405 of the Rail Passsnger Service Act upon which we should base future employee protection under section 1a(4) of the act. Since the operative language of section 5(2)(f) is almost identical to that of section 1a(4),[3] we believe the review board acted properly in imposing the employee protective conditions enunciated in *Oregon Short Line* in this case. Thus, our reasoning in *Oregon Short Line* supports the review board's decision.

Before proceeding with our discussion of the contentions of the parties we should indicate that certain modifications have been made in the conditions adopted in *Oregon Short Line* by our most recent report and order in that proceeding at 354 I.C.C. 584 (1978). For the reasons set forth in that report, we shall also modify the employee protective conditions imposed in this case in the same manner. Any further reference to the employee protection imposed in *Oregon Short Line* shall be to the conditions as modified. The modified conditions are set forth in the appendix to this report, with appropriate modifications to make them applicable to trackage rights transactions.

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[2] *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177 (1944).

[3] Section 1a(4) requires employee protective provisions to "be at least as beneficial to such interests as provisions established pursuant to section 5(2)(f) of this Act and pursuant to section 405 of the Rail Passenger Service***."

Section 5(2)(f) requires an arrangement for employee protective "no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 405 of the Rail Passenger Service Act.***."

Petitioner claims that the Appendix C-1 conditions are less protective of the interests of employees than the conditions previously imposed pursuant to section 5(2)(f). It claims those conditions are insufficient in this case because they contain no provisions equivalent to sections 4 and 5 of the Washington Job Protection Agreement; petitioner cites *Southern Ry.—Control—Central of Georgia Ry. Co.*[4] for the proposition that sections 4 and 5 of the Washington Agreement are indispensible prerequisites to effectuating a valid order of approval under section 5(2) of the act.

We do not believe section 5(2)(f) of the act requires us to impose section 4 and 5 of the Washington Agreement in this proceeding or in other ordinary trackage rights proceedings. Petitioner's argument for imposition of such protection is based upon that part of amended section 5(2)(f) which requires protection equal to the protection imposed pursuant to that section prior to its amendment by the 4R Act. We must determine what the standard of protection was under old section 5(2)(f).

In the past the Commission imposed different employee protective conditions in different types of section 5(2) cases. For example, the *Oklahoma* conditions were ordinarily imposed in trackage rights cases and the *New Orleans*[5] conditions, with modifications as were necessary, were frequently imposed in merger-control-type cases. The *Oklahoma* conditions which had been used in trackage rights cases do not contain protection equivalent to sections 4 and 5 of the Washington Agreement.

Congress was aware of the fact that different employee protective conditions had been used in different types of transactions when it passed the 4R Act. The 4R Act does not indicate any disapproval of the fact that different protective conditions had been used in different cases. Since the Commission did not impose sections 4 and 5 of the Washington Agreement in trackage rights cases in the past, our failure to impose those sections in this case cannot now (under the 4R Act) be considered inappropriate. The resulting arrangement is not less protective of the interest of employees than the arrangement imposed under old section 5(2)(f) in trackage rights cases.

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[4] 331 I.C.C. 151 (1967).

[5] *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952).

Nothing in *Southern Ry.—Control—Central of Georgia, supra,* is to the contrary. That case was a control proceeding where a reduction in force was contemplated, and a consolidation of seniority rosters would be required. No consolidation of forces is required in ordinary trackage rights cases. There is no need for sections 4 and 5 of the Washington Agreement to be imposed in them.

N&W proposes its own set of conditions consisting of the *Oklahoma* conditions with the addition of certain provisions from the Appendix C-1 conditions. In support of its contention that the conditions it proposes would provide a proper standard of protection, N&W incorporates by reference a portion of the American Association of Railroads' "Comments of the Association of American Railroads Upon Proposed Conditions for Protection of Employees" (AAR Comments). Those comments were invited by the report on reconsideration in No. AB-36 (Sub-No. 2), *Oregon Short Line, supra.*

AAR's basic argument is that Congress did not intend to have the Commission change its employee protective policy to a significant extent and that adopting the Appendix C-1 conditions is contrary to that congressional intent. The AAR comments then go on to address the further protection that it believes the amendment to section 5(2)(f) requires. We agree with applicant that the argument of the American Association of Railroads, even though it is addressed to the proper employee protective standards in abandonment proceedings, is relevant to this case. However, we believe those contentions are adequately addressed in the latest report in *Oregon Short Line*. We see no need to address them here.

For the reasons set forth above and in our latest report in *Oregon Short Line,* we find that the petition for administrative review and the modifications proposed by the applicant should be denied.

It is ordered:

(1) The petition for administrative review is denied.

(2) The modifications proposed by applicant are denied.

(3) The employee protective conditions be modified as set forth in the appendix to the attached report.

(4) Except as modified the order of Review Board No. 5 is affirmed.

(5) The order of Review Board No. 5 served September 13, 1977, as modified, shall be effective 20 days from the date of service of this order.

Commissioner Gresham concurring in the result.

NOTE: The parties are advised that this decision is administratively final under the provisions of section 17(9)(c) of the Interstate Commerce Act. Any further administrative appeal can be entertained only under section 17(9)(d) of the act which permits such an appeal only if the entire Commission finds that a matter of general transportation importance is involved, that clear and convincing new evidence has been presented, or that there exist changed circumstances which would materially affect the decision made herein. Such an appeal must be filed within 20 days of the date of service of this order.

APPENDIX

Article I

1. Definitions.—(a) "Transaction" means acquisition by a railroad of trackage rights over, joint ownership in, or joint use of, any railroad line or lines owned or operated by any other railroad, and terminals incidental thereto.

(b) "Displaced employee" means an employee of the railroads who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of the railroads who, as a result of a transaction is deprived of employment with the railroads because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

(d) "Protective period" means that period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroads prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that there shall be no duplication or pyramiding of benefits to any employees, and, provided further, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities, and obligations accompanying such benefits.

4. When the railroads contemplate a transaction, they shall give at least twenty (20) days' written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroads and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be effected by such transaction, including an estimate of the number of employees of each class affected by the intended changes.

At the request of either railroad or representatives of such interested employees, negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix shall commence immediately and continue for not more than twenty (20) days from the date of notice. Each transaction which will result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of the twenty- (20-) day period there is a failure to agree, the negotiations shall terminate and either party to the dispute may submit it for adjustment in accordance with the following procedures:

(a) Within five (5) days from the termination of negotiations, the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee, then the National Mediation Board shall immediately appoint a referee.

(b) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(c) The decision of the referee shall be final, binding, and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(d) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

Notwithstanding any of the foregoing provisions of this section, at the completion of the twenty- (20-) day notice period the railroads may proceed with the transaction, provided that all employees affected (displaced, dismissed, rearranged, et cetera) shall be provided with all of the rights and benefits of this appendix from the time they are affected through to expiration of the seventy-fifth (75th) day following the date of notice of the intended transaction. This protection shall be in addition to the protection period defined in article I, paragraph (d). If the above proceeding results in displacement, dismissal, rearrangement, et cetera other than as provided by the railroads at the time of the transaction pending the outcome of such proceedings, all employees affected by the transaction during the pendency of such proceedings shall be made whole.

5. Displacement allowances.—(a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

6. Dismissal allowances.—(a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroads shall cease while he is so reemployed. During the time of such reemployment, he shall be entitiled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earnings of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, or failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon employment rights of other employees under a working agreement.

7. Separation allowance.—A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

8. Fringe benefits.—No employee of the railroads who is affected by a transaction shall be deprived during his protective period of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, relief, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroads, in active service or on furlough as the case may be to the extent that such benefits can be so maintained under present authority of law or corporate action or though future authorization which may be obtained.

9. Moving expenses.—Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction,

and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not to exceed 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for a reasonable time hereafter and the ways and means of transportation to be agreed upon in advance by railroad and the affected employee or his representatives; provided, however, that changes in place of residence which are not a result of the transaction, which are made subsequent to the initial change or which grow out of the normal exercise of seniority rights, shall not be considered to be within the purview of this section; provided further, that the railroad shall, to the same extent provided above, assume the expenses, et cetera for any employee furloughed within three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provisions of this section unless such claim is presented to railroad within 90 days after the date on which the expenses were incurred.

10. Should the railroads rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. Arbitration of disputes.—(a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute on controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee.

Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroad, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. Losses from home removal.—(a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to received a dismissal allowance) who is required to change the point of his protective period as a result of the transaction and is therefore required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are made subsequent to the initial changes caused by the transaction and which grow out of the normal exercise of seniority rights, shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employees, or their representatives, and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceeding. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position

comparable to that which he held when terminated or furloughed, even though in a different craft or class, on railroad which he is, or by training or retraining physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or retraining is requested by such employee, the railroad shall provide for such training or retraining at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under sections 1 or 2 of this article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

ARTICLE IV

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established pursuant to section 5(2)(f) of the Interstate Commerce Act. In so doing, changes in wording and organization from arrangements earlier developed under section 5(2)(f) have been necessary to make such benefits applicable to transactions as defined in article I of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act and pursuant to section 405 of the Rail Passenger Service Act.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.

DECISION

FINANCE DOCKET NO. 28583 (SUB-NO. 1F)[1] [2]

BURLINGTON NORTHERN, INC.—CONTROL AND MERGER—ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

Decided June 14, 1978

Petitions seeking findings that proposed trackage rights are not major market extensions denied. Definition of major market extension clarified to include significantly enhanced competitive posture.

We have determined that the trackage rights proposed to be requested by the Illinois Central Gulf Railroad Company (ICG), over the St. Louis-San Francisco Railway Company (Frisco), between Kansas City, MO and Jasper, AL, could be a major market extension. We have also determined that the trackage rights proposed to be requested by William M. Gibbons, Trustee of the Property of Chicago, Rock Island and Pacific Railroad Company, Debtor (Rock Island), over the Colorado and Southern Railway Company (C&S), a subsidiary of Burlington Northern, Inc. (BN), could be a major market extension. The proposed request for trackage rights by the Chicago and North Western Transportation Company (C&NW), between Council Bluffs, IA, and BN Junction, KS (Kansas City), via St. Joseph, MO, over BN could also be a major market extension. The proposed requests for trackage rights by the Rock Island over the BN lines between Havelock and Lincoln, NE, and Streator and Ottawa, IL, are not major market extensions. The C&NW proposed request for trackage rights between Minneapolis and Duluth-Superior, MN, and between St. Anthony, Minneapolis and Westminster Street, St. Paul, MN, over BN are not major market extensions.

Pleadings.—The ICG petition was filed on April 24, 1978. BN-Frisco replied to that petition on May 11, 1978, Rock Island filed its petition on May 8, 1978, and C&NW filed its petition on May 18, 1978. BN replied to Rock Island's petition on May 22, 1978.

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[1] This decision embraces Finance Docket No. 28583 (Sub-No. 2), Burlington Northern, Inc.—Securities and docket No. MC-F-13500 Burlington Northern, Inc.—Control—Frisco Transportation.

[2] A copy of this decision will be filed in Ex Parte No. 282 (Sub-No. 1), Railroad Consolidation Procedures.

Filing requirements for a major market extension.—The information required to be filed in a major market extension is contained in the Interstate Commerce Commission *Railroad Acquisition, Control, Merger, Consolidation, Coordination Project, Trackage Rights and Lease Procedures,* 42 F.R. 14871 (to be codified in 49 CFR 1111) (consolidation procedures). We have determined that a trackage rights transaction significantly altering the competitive picture in a market is a major market extension. *Railroad Consolidation Procedures,* 348 I.C.C. 771, 780 (1977). An application for trackage rights must comply with the information required by sections 1111.1 and 1111.2(a) and (d) of the consolidation procedures. When a trackage rights application involves a major market extension, "applicants shall also file exhibits required under section 1111.2(b)(1) through (3) inclusive, except for good cause shown." Section 1111.2(d) of the Consolidation Procedures.

Major market extension defined.—A major market extension shall include, but need not be limited to, transactions which affect an end-to-end extension of applicant's routes and services or which requires applicant's participation in additional through routes or joint rates. Section 1111.2(d) footnote 7 of the consolidations procedures. The term major market extension describes significant transactions involving competitive affects similar to those in a major consolidation case.

There are at least two ways a trackage right may significantly increase competition. One is to extend service into a new market. The other method is to provide a significantly more efficient and effective competitive service to a market presently being served. Criteria which can be used to determine if a railroad is proposing to provide a more competitive service to a currently served area include, but are not limited to, whether or not a shorter route is involved, if the new route provides faster service, if this route extends into major markets, under what conditions the application is filed and the traffic study submitted with the application. Based upon this information we will use our expertise to determine if a major market extension is contemplated. The information required by sections 1111.2(b)(1) through (3) must be provided, unless waived, if we believe that the proposed transaction could be a major market extension.

Rock Island-Denver to Golden, CO.—One of the western termini of the Rock Island is at Denver, CO. Although Golden is only 15.86 miles from Denver, Coors beer is shipped from Golden, and we believe this could be a major market extension. Additionally, a new federally funded energy research facility has recently opened at Golden. BN and C&S handled 37,681 cars over the line between Golden and Denver in 1977. This accounted for $17,085,624 in gross revenue for BN. BN exclusively serves all but four of the shippers on the line. For these reasons, we will require Rock Island to file the information required for a major market extension.

ICG-C&NW improved competitive position.—Although ICG currently serves Kansas City, MO, Memphis, TN, and Birmingham, AL, the route is more circuitous than trackage rights over Frisco. A grant of these trackage rights would reduce the mileage between Kansas City and Birmingham by 60 miles, between Kansas City and Memphis by 145 miles, and between Memphis and Birmingham by 151 miles. From Birmingham to Kansas City Frisco has two trains daily one which requires 26 and 1/2 hours and the other which requires 47 hours. ICG on the other hand, has one train scheduled per week which requires 54 hours to make the run from Birmingham to Kansas City. From Kansas City to Birmingham the weekly ICG train takes 54 and 1/2 hours. Frisco runs three trains daily from Kansas City to Birmingham taking 32, 38 and 54 hours to reach Birmingham. This indicates that if ICG is permitted trackage rights between Kansas City and Birmingham it would be able to provide a significantly more effective and efficient competitive service in the area.

Additionally, as BN-Frisco points out, over 36 million dollars of the traffic volume moving between Kansas City and Birmingham is overhead traffic highly susceptible to diversion. Not only would trackage rights between Kansas City and Jasper permit ICG expedited service to Kansas City, Memphis and Birmingham, but also to New Orleans and Mobile. Finally, the trackage rights application is proposed to be filed in response to the merger proceeding involving BN-Frisco. ICG admits that the proposal is designed to attract new traffic to offset the predicted revenue loss from the BN-Frisco merger.

Considering all of the above, we believe that the proposed trackage rights between Kansas City, MO and Jasper, AL, by ICG over Frisco could be a major market extension, and will require ICG to file the neceessary information with their application.

C&NW does not seek to serve intermediate points by its proposed trackage rights, but to provide more expeditious routes for its traffic, to conserve energy and to reduce its present costs. Between Council Bluffs, IA and Kansas City, MO, C&NW currently travels 411 miles. The proposed trackage rights will reduce that distance to [illegible] miles. This would greatly decrease C&NW's time enroute from Council Bluffs to Kansas City. It would also open a major competitive route from WY, SD, NE, MN and IA to Kansas City for C&NW to compete with BN. This might result in diversion of traffic from BN to C&NW. Again, we not that the proposal is in response to the BN-Frisco merger.

We believe that trackage rights between Council Bluffs, IA, and Kansas City, MO, over the BN by C&NW could be a major market extension. C&NW will be required to file the information now required by the consolidation procedures for a major market extension.

Proposals found not be major market extension.—The remaining proposed trackage rights of Rock Island and C&NW do not meet the criteria which we have set up to define major market extensions. These proposals involve a route for the more direct interchange of traffic, direct switching, use of a better track over a short distance, and a more direct route not significantly affecting C&NW's competitive ability. These routes are between Minneapolis and Duluth-Superior, MN, St. Anthony, Minneapolis, and Westminster Street, St. Paul, MN, Havelock and Lincoln, MN and Streator and Ottawa, IL.

For these proposed trackage rights, the applications need only contain the information required by section 1111.2(a) and (d) of the consolidated procedures.

Even though we have found that certain of the proposed trackage rights could be major market extensions, this does not preclude those parties from seeking waiver of portions of the consolidation procedures. The policy and procedures for requesting waiver have been set out in *Burlington Northern, Inc.—Control & Merger—St. L.*, 354 I.C.C. 182 (1977) and *Itel Corp.—Control—Green Bay and W. R. Co.*, 354 I.C.C. 232 (1978). All traffic studies and other data must conform with the same time frame as the studies submitted by BN-Frisco in their application.

This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered:

(1) The petition of the Illinois Central Gulf Railroad Company is denied.

(2) The petition of William M. Gibbons, Trustee of the Property of Chicago, Rock Island and Pacific Railroad Company, Debtor, is denied, except to the extent granted in this decision.

(3) The petition of the Chicago and North Western Transportation Company is denied, except to the extent granted in this petition.

(4) In the event ICG, Rock Island, and C&NW file trackage rights applications which could be major market extensions, they are required to conform with the requirements for major market extensions for trackage rights between Kansas City, MO, and Jasper, AL, Denver and Golden, CO, and Council Bluffs, IA, and Kansas City, MO, respectively.

(5) This decision shall be effective on the date of service.

By the Commission, Chairman O'Neal, Vice Chairman Christian, Commissioners Murphy, Brown, Stafford, Gresham, and Clapp. Commissioner Murphy not participating.

DECISION

FINANCE DOCKET NO. 26115

BOSTON AND MAINE CORPORATION, REORGANIZATION—TENDER OFFER

Decided June 23, 1978

Initial decision of Administrative Law Judge authorizing tender offer for certain percentage of Boston and Maine's First Mortgage Bonds, adopted with modifications.

The Reorganization Trustees of the Boston and Maine Corporations (B&M) filed a petition with the Reorganization Court on July 27, 1977, for authority to make a tender offer to redeem a certain percentage of the B&M's First Mortgage Bonds. The bonds' were secured by a mortgage indenture covering substantially all the debtor's property. A sale of B&M's commuter rail properties was authorized as the first step of a Plan of Reorganization filed on December 12, 1975. Proceeds of the sale totaled approximately $40.9 million. This money along with proceeds from the sale of certain other B&M real estate are subject to the above-noted Indenture. This money totals approximately $52.4 million and is subsequently referred to as "Restricted Funds."

The Commission, by order of October 25, 1977, advised the Reorganization Court that primary jurisdiction over the proposed tender offer lay with the Commission. The matter was assigned to an Administrative Law Judge and an initial decision was issued on December 16, 1977, which approved the use of $20.5 million of Restricted Funds to redeem the first mortgage bonds at a price of $800 per $1,000 par value.

The Commonwealth of Massachusetts submitted an appeal to the initial decision on January 5, 1978, and subsequently filed a "petition for reconsideration" which proposes to introduce new evidence and make additional contentions based on it. The new evidence consists of a certain claim filed by the Northern Railroad against the B&M on January 6, 1978, and the petition and evidence will be allowed for a full consideration of the issues. The Maine

Department of Transportation submitted a letter-appeal on February 2, 1978, which is late-filed and shows no certificate of service on other parties and accordingly must be rejected. Replies to the Commonwealth's pleadings were filed by Madison Fund, Inc., as holder of 22 percent of the bonds outstanding on March 31, 1978, the First Mortgage Trustees on February 1, 1978, and the Reorganization Trustees on February 1, 1978. On February 15, 1978, the Maine Central Railroad Company and the Portland Terminal Company filed a motion for leave to file a tendered reply to the replies of Madison Fund and the First Mortgage Trustees. Since these two replies contain an appeal to the reservation of certain funds provided for in the initial decision, and otherwise raise new issues, we will allow the filing of the tendered joint reply.

The First Mortgage Trustees have attacked the finding of jurisdiction made by the Commission. Since a finding of lack of jurisdiction would render any consideration of the other issues unnecessary, we will address this issue first.

The Reorganization Court certified to the Commission the question of jurisdiction on October 4, 1977. The Commission, indicating that it considered the proceeds to be an integral part of the overall Plan of Reorganization, answered in the affirmative. We reaffirm that finding based on precedent and the circumstances of this proceeding. It has often been said that §77 "manifests the intention of Congress to place reorganization under the leadership of the Commission, subject to a degree of participation by the Court." *In re Boston and Maine Corporation*, 484 F. 2d 367, 372 (3d Cir. 1973), *Tennessee* v. *Taylor,* 169 F. 2d 626 (6 Cir. 1948). The tender offer proposed in the instant case is an integral part of Step One of the 1975 Plan of Reorganization already approved by this agency and is therefore under the guidance of the Commission. Step One involved the sale of the debtor's rail commuter line and the proposed tender offer is premised primarily upon the use of these funds. The proposed tender offer use—like the approved sale to which the tender offer is directly related—has significant impact upon the ultimate reorganization of the railroad. For these reasons, Commission jurisdiction lies in this matter. The dividing line between the jurisdiction of the court and the Commission was examined in more detail in *In re Penn Central Transportation Company,* 358 F. Supp. 154 (E.D. Pa. 1973). The court in that proceeding felt that the critical factor in determining whether reference must be made to the Commission, was whether the transaction constituted a part of the reorganization plan (*Penn*

Central, supra p. 182). Since the proposal in *Penn Central* did not affect the configuration of the debtor's rail system, or present direct questions as to its earning power or resulting capital structure, recourse to the Commission for approval was determined to be unnecessary. Numerous cases have held that the "ratio of debt to stock, the amount of fixed as distinguished from contingent interest, and the kind of capital structure which a particular company needs to survive the vicissitudes of the business cycle-all these have been reserved by Congress for the expert judgment and opinion of the Commission." *Penn Central, supra p.* 179, *Group of Investors* v. *Milwaukee R.R.*, 318 U.S. 523 (1943), *New Haven Inclusion Cases*, 399 U.S. 392 (1970). It hardly merits discussion that this transaction is clearly related to a reorganization step previously approved by the Commission and has the power to affect the earning power and resulting capital structure of the B&M. Approval of the tender offer, which is possible only because of a previously approved reorganization step, could result in a reduction of debt and fixed interest, simplify the mortgage structure and improve the company's ability to attract new investment and loans. The sum of money involved is enormous and its use for debt retirement could, conversely, affect the very ability of the railroad to successfully reorganize. The critical role the tender offer plays in the future financial health of the company and its relationship to a previous reorganization step qualifies the proposal as an integral part of the reorganization plan and within the Commission's jurisdiction.

We concur with the Administrative Law Judge's opinion that approval of the tender offer would be in the best interests of the railroad. In *In re Long Island R.R.*, 114 F. Supp. 363 (E.D. N.Y. 1953), the payment of tax liability at a discount with funds derived from the sale of property was proposed. Protesting parties claimed that this payment would leave no funds for physical improvement of the railroad. The court indicated that the reduction of secured indebtedness of the debtor "cannot be viewed as other than a constructive achievement in its financial condition" (p. 367). The court also believed that borrowing capacity would be improved, and the desired rehabilitation of the line thereby fostered rather than the reverse (p. 360). Similarly, the court in *In re Wisconsin Cent. Ry.*, 72 F. Supp. 669, 671 (D.C. Minn. 1947), stated that "(t)he purchase of bonds at a discount under a plan approved by the bondholers concerned, which would treat all of them fairly and impartially and without any coercion *** may be simply sound business on the part of the Trustees in availing themselves of an opportunity to reduce the outstanding indebtedness on the road, and the result may be a distinct advantage to the entire estate *** and simplify the problem of reorganizing the debtor railroad." Authorization was not granted in that case[1] because the plan of reorganization was just about to be considered and bondholers had objected to the tender offer. Here, conversely, the tender offer in effect implements a financial restructuring opportunity made possible by an approved reorganization step, and has the support of bondholders.

The trustees have requested authority to draw down up to $32 million from the Restricted Funds to make the tender offer, and suggested 85 percent of par value as a fair price; the Administrative Law Judge decided that 80 percent was more appropriate and no one objects to this determination. The trustees have conceded certain priority claims to the fund, including real estate taxes, personal injury claims, freight damage, loss claims and administration, and other expenses totaling $13.536 million. Administrative Law Judge Keyes indicated that $16.4 million should be reserved for other present and potential priority claims such as per diem claims, 6 months and necessity of payment rule claims, State tax and interest. The bondholders contest the priority of some of these claims; other parties, conversely, point out that there are other potential priority claims of undeterminable amounts. The Administrative Law Judge, after consideration of the cited claims, and having set aside a reservation of $5 million for deferred maintenance, improvements and modernization, found that approximately $20.5 million was available in the Restricted Funds for the tender offer, that the use of this amount would not adversely affect the B&M's estate and would be a prudent mothod of reducing its indebtedness. In consideration of B&M's past tax settlements, at a rate of 55.4 percent of total principal and interest, the Administrative Law Judge authorized settlement at 54.2 percent for the bondholers, or $800 for each $1,000 bond.

The crucial factor in any determination of the use of the Restricted Fund, is its origin from the sale of mortgage property, and the consequence that the proceeds are burdened by the same liens as were the properties. The Bankruptcy Act grants board discretion to a Reorganization Court's ultimate decisions involving the application and disposition of proceeds of the sale of mortgaged property, but discretion is restricted less it amount to an unconstitutional taking of the mortgage holders' property in violation of the 5th Amendment. We think that this constitutional restriction was not properly taken into account in determining the amounts available to satisfy the bondholders' lien.

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[1] It was subsequently approved at a more propitious time, however.

The reservation of $5 million for improvements and deferred maintenance cannot be allowed. The reservation of portions of mortgage property proceeds for such purposes was considered in the cases of *In re Third Ave. Transit Corp.*, 198 F. 2d 703 (2nd Cir. 1952), (the *Third Avenue* case), and *Central R.R. of N.J.* v. *Manufacturers Hanover Trust Co.*, 421 F. 2d 604 (3d Cir. 1970), cert. denied 398 U.S. 949 (1970), (the *Central of N.J.* case)[2]. *Third Avenue* involved the subsidizing of operations with proceeds from the sale of mortgaged assets. To protect against the unconstitutional forced investment by the secured creditors in the bankrupt railroad, the court indicated that certain conditions must be satisfied before using the funds. The *clearest* evidence is required that it is imperative to obtain the funds, that the funds cannot be obtained elsewhere, and that there be a high degree of likelihood that the debtor can be reorganized in accordance with the act, within a reasonable time, and that the secured creditors whose security is being compulsorily loaned will not be injured. Public interest in the railroad's continued operations is considered as only one factor to be taken into account, and one not allowed to outweigh all the others (*Third Avenue, supra* pp. 706-707). In the *Central of N.J.* case, the court evolved a four prong test along similar lines to regulate the use of mortgage proceeds for additions and betterments. The conditions were less stringent since additions and betterments—as opposed to subsidizing operations—increase the base of the mortgage holder's remaining security. In addition to a finding that the funds are presently needed and cannot be obtained elsewhere, the court in *Central of N.J.* found that it need only conclude that the reorganization is ***probably feasible***, and that the money expended for additions and betterments will materially contribute to the possibility of a successful reorganization and the continuation of the transportation plant as a going concern.

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[2] We have considered both the *Third Avenue* and the *Central of N.J.* case since "maintenance and improvements" discussed in the former case could cover *de facto* additions and betterments as indicated in the latter case. This interrelationship is clearly demonstrated by the *Central of N.J* case itself. The proceeds there were to be used for the removal of a damaged span, which the court found inured to the benefit of the bondholders since it insured the continued operation of the railroad. However, the court found that this improvement to the line was more like an operating expense than an addition or betterment since the expenditure did not increase the value of the mortgaged property by adding to the operational plant. *Central of N.J.* (p. 607).

Additonally, it was required that the interests of the bondholders not be prejudiced by the draw down. According to the rationale of *Central of N.J.*, unless the expenditure increases the operational plant subject to the bondholders' lien, it is not an addition or betterment. The "probably feasible" reorganization test was slightly modified in ***In re Penn Central, supra***, p. 276 where, as here, a final plan of reorganization had not been filed, nor was one imminent. The court, therefore, interpreted the condition that reorganization be probably feasible, as requiring only that there be no demonstrated likelihood of failure. This decision also indicated that absent a finding that the required tests had been satisfied permitting general use of funds subject to bondholders' liens, orders directing the use of such funds for purposes other than the repayment of the bondholders' debt, were invalid. We have considered the evidence presented by the parties and the findings made by the Administrative Law Judge and concluded that the tests cannot be met. Accordingly, the $5 million reserve is invalid for use regardless of whether for maintenance or additions and improvements, and that amount should be added to the amount available for the tender offer.

In discussing the application of the tests to the evidence in the instant case, we shall refer to the *Central of N.J.*, requirements since it is the less stringent of the two, and failure to pass that would moot the question of passing the *Third Avenue* test.

Here, the initial decision failed to adequately consider the prejudice to the bondholders' rights as required in *Central of N.J.* The use of the restricted funds is not presently essential for the railroad's operating plant while the funds' expenditure would reduce the liquid security of the bondholders and tie them more firmly to the fate of the railroad. The finding of no prejudice requires a determination that the plant subject to the superior lien is worth no less after the additions and betterments than before the sale and reinvestment. *In re Penn Central Transportation Company*, 494 F. 2d 270, 276 (3d Cir. 1974), cert. denied 419 U.S. 883 (1974). Although the value of the property might be preserved in this case, the railroad's 20-year history of losses indicates that the bondholder's rights might be increasingly diminished by the continuing build-up of superior liens. Moreover, while the railroad's history of earnings and probable future performance are not sufficiently poor to necessarily jeopardize reorganization, it may well be years before sufficient surplus funds are generated to repay debt and interest on the bondholders' liens. The requirement of lack of prejudice to the bondholders cannot be met.

Furthermore, funds needed for essential railroad purposes are apparently available elsewhere. The railroad has submitted an application for $25.9 million in assistance to the Federal Railroad Administration (FRA), and receives funds from the New England Regional Commission, and Federal funds from the highway program and C.E.T.A. A reduction in long-term debt will also increase the B&M's ability to borrow from outside commercial sources. It was also noted in *Florida East Coast Ry. Co. Reorganization*, 261 I.C.C. 151 (1945), that if insufficient funds remained after retirement of certain first mortgage bonds, it was possible to devise a new first mortgage.

Additionally, it is doubtful that reorganization would be jeopardized without the $5 million reserved by the Administrative Law Judge. The Reorganization Trustees have carried on a program of improvements and modernizations to date with the use of other funds. In the last 4 years, the trustees have expended $15 million on track, ties and other improvements. The requirement to reserve $5 million for improvements and maintenance is accordingly deleted.

Appellant has contended that certain findings must be made relative to capital improvement/rehabilitation needs before approving a tender offer. This contention is not well founded. Section 77 of the Bankruptcy Act, 11 U.S.C.A., §205(o) states "The proceeds derived from any such sales (of property) shall be received by the trustee or trustees subject, in case the property was sold free from lien, to any liens thereon at the time of sale, and shall be applied or disposed of in such manner as the Judge by further order shall direct ***. The Judge may order the trustee or trustees of the debtor to deposit such proceeds with any mortgage trustee entitled thereto, to be applied in payment of all or part of such mortage." The authority cited by appellant, *In re Wisconsin Central Railway Company*, No. 17104 (D.C. Minn. 1948), order No. 69, did not involve funds derived from the sale of the bondholders' security, and was not, therefore, subject to the 5th Amendment restrictions discussed earlier relative to property rights.

The propriety of setting aside additional sums for certain creditors must also be evaluated in conformance with previously-discussed court decisions. The initial decision set aside funds for claims more properly classed as operating expenses, and, therefore, subject to the *Third Avenue* test before payable out of the Restricted Funds. Claims for injuries to employees as classified by the Bankruptcy Act §77(a) are directed to be paid out of the assets of the railroad as operating expenses. Other personal injury and property damage claims, are classified as operating expenses because "(i)n the very nature of things these risks and events attach to, emanate from, and grow out of the process of earning income." *In re Chicago, R.I. & P. Ry.*, 90 F. 2d 312 (7th Cir. 1937). There is evidence in the record to indicate that these expenses along with administrative expenses have heretofore been payable out of the operating revenue of the railroad despite the years of continuing losses. There appears to be no reason, now that the company's financial picture has been improved by the sale of its commuter rail lines, to expect that this method of payment will be less adequate in the future. Should any emergency or catastrophe arise substantially impairing the railroad's finances (a major recession or particularly adverse weather, for example), the railroad's improve debt structure resulting from the retirement of the first mortgage bonds should enable it to borrow needed funds. Since money is available elsewhere, the stringent requirements of the *Third Avenue* test cannot be met and accordingly, the $7.560 million reserved by the Administrative Law Judge in the initial decision for personal injury, freight loss and damage, and administrative expenses is disallowed.

We have not disallowed the reserve for per diem and 6-month claims as there is no evidence that these are being paid out of operating revenues at this time. It is, therefore, possible that the funds to pay these claims would not be available elsewhere when they are needed and the reorganization—which now appears likely at a future time—place in jeopardy. Liquidation of the carrier as opposed to its reorganization in the near future, could well be substantially more serious to the bondholders. However, the set aside of funds for these items is predicated upon their being classified as senior priority matters by the Reorganization Court—a matter which is still not settled. Should they not be so classified, the reserve in the Restricted funds for these matters could properly be removed by the Reorganization Court absent other considerations.

Appellant's "petition for reconsideration" has noted that Northern Railroad has asserted a very large potential priority claim ($30 million) in a pleading filed January 6, 1978, with the Reorganization Court. This claim is based upon B&M's anticipated disavowal of a lease arrangement with Northern Railroad and simply reiterates Northern Railroad's prior claim on this issue submitted in a December 1972, motion to the Reorganization Court. There is no evidence that this claim is any more significant now than it was in 1972. Moreover, even if the claim were fully approved, it could be avoided by B&M's simply deciding to affirm the lease. Accordingly, there is no basis for altering our decision based upon Northern's January 6, 1978 pleading.

All other matters raised by the pleadings have been evaluated and found not to require further discussion.

It is ordered:

1. The findings of the Administrative Law Judge contained in the initial decision of December 15, 1977, are adopted as modified by this decision. The trustees are authorized to make a tender offer to redeem first mortgage bonds out of the Restricted Funds to the extent of no more than $33.060 million, at a price of $800 per $1,000 par value.

2. The petition for reconsideration submitted by the Commonwealth of Massachusetts is accepted.

3. The appeal submitted by the Maine Department of Transportation is rejected.

4. The joint petition of Maine Central Railroad Company and the Portland Terminal Company to file a reply to certain replies is approved.

5. This decision shall be effective 20 days from the date of service.

6. This decision is administratively final under the provisions of section 17(9)(c) of the Interstate Commerce Act. Any further administrative appeal can be entertained only under section 17(9)(d) of the act which permits such an appeal only if the entire Commission finds that a matter of general transportation importance is involved, that clear and convincing new evidence has been presented, or that there exist changed circumstances which would materially affect this decision. Such an appeal must be filed within 20 days of the date of service of this decision.

By the Commission, Chairman O'Neal, Vice Chairman Christian, Commissioners Murphy, Brown, Stafford, Gresham, and Clapp.

FINANCE DOCKET NO. 28697

SOUTHERN RAILWAY COMPANY—DISCONTINUANCE OF TRAINS NOS. 1 AND 2 THE "SOUTHERN CRESCENT" BETWEEN WASHINGTON, D.C., AND NEW ORLEANS, LA.

Decided August 1, 1978

Upon investigation found that operations by Southern Railway Company and its wholly owned subsidiary, The Alabama Great Southern Railway Company of train Nos. 1 and 2 between Washington, D.C., and New Orleans, La., is required by public convenience and necessity and that continued operation for a period of 1 year will not unduly burden interstate commerce. Operations of trains required for 1 year to make orderly a possible transfer to Amtrak.

REPORT OF THE COMMISSION

Pursuant to the provisions of section 13a(1) of the Interstate Commerce Act, Southern Railway Company and its wholly owned subsidiary The Alabama Great Southern Railroad Company (Southern), common carriers by railroad subject to the provisions of part I of the act by notice and supporting statements filed March 6, 1978, proposed to discontinue effective April 6, 1978, their operation of passenger train Nos. 1 and 2, "Southern Crescent," between Washington, D.C. and Atlanta, Ga., and the triweekly operation of these trains between Atlanta and New Orleans, La. Copies of the notice of this proposal were served and posted in the manner required by statute and by the regulations of the Commission.

By order dated March 24, 1978, the Commission responded to protests filed by individuals and associations and instituted an investigation of proposed discontinuance to determine whether the proposal is required by the public convenience and necessity and required that the operations of train Nos. 1 and 2 be continued pending hearing and decision in this investigation for 4 months beyond April 6, 1978, when the discontinuance would otherwise have become effective. Because of the statutory limitations and the time available for an investigation and decision the order provided for omission of an initial decision by an Administrative Law Judge as part of the decisional process.

An environmental threshold assessment survey was prepared by the Office of Proceedings, Section of Energy and Environment. Notice of that assessment was served May 31, 1978, and published in the Federal Register. Copies of the notice and survey were served on all parties of record. The survey, concluded among other things, that diversion of passenger traffic to other means of transportation would not create significant impacts on the area bus, air and highway transportation system. Such diversion would not cause significant increases in energy consumption, air pollution, noise intrusions, or safety hazards. The effect on income and employment levels on the various communities served by the "Southern Crescent" is not expected to be significant and discontinuance should not have a serious adverse impact on rural and community development. Comments on the environmental threshold assessment survey were submitted on July 7, 1978. No substantial environmental evidence was presented in the public hearings and the assessment will be adopted in this proceeding.

Hearings were held at Washington, D.C., and 20 other cities along the route of the "Southern Crescent" beginning on May 12, 1978, and concluding on June 15, 1978, at New Orleans, La. Briefs were filed by Southern and the National Association of Railroad Passengers (NARP), Railway Labor Executives' Association and the Railway Employees' Department and Sheet Metal Workers' International Association.

PRELIMINARY MATTER

The National Association of Rail Passengers (NARP)[1] contends that Southern failed to comply with the notice provisions of 49 CFR Part 1122, *et seq.* requiring posting and service of notice in each station, depot, or facility affected and at the termini between which the train operates. NARP's position is that Southern by not posting notice north of Washington at the eight stations beyond Washington, D.C., and by failing to send copies of its notice and statement to the Governors and regulatory bodies of Maryland, Delaware, Pennsylvania, New Jersey, and New York has not properly identified the end points for the train.

Such contentions are without substance. Southern does not operate a passenger route north of Washington and indeed has clearly delineated on its passenger trains schedule that the "Southern Crescent" operates between Washington and New

[1] Also raised by Railway Labor Executives' Association (RLEA).

Orleans. The services Southern holds out to the public are those between the Washington and New Orleans points. The inclusion on the train schedule of points north of Washington include the Amtrak service which is provided to Boston on the northern connection and on the southern connection of the train the schedule reflects the Amtrak service joined at New Orleans for the transcontinental points terminating in Los Angeles.

NARP attempted to dismiss at the hearing the proceeding on a second ground that the Southern's proposal had been filed on March 7, 1978, and the records of this Commission so reflected. However, Southern's copy of its filing indicated that it had indeed filed this application on March 6, 1978. The Administrative Law Judge at the time of hearing required counsel for Southern to file with the Commission an affidavit that the application had been filed on March 6, 1978. The affidavit was duly placed in the public docket. The application and transmittal letter were stamped with the date March 6. However, a copy of the application which was apparently processed the next day at the Commission received a stamp date of March 7, 1978 and the Administrative Law Judge determined the correctness of the March 6th date during the hearing and rightly determined that no issue was before the hearing.

TRAIN OPERATIONS

Train Nos. 1 and 2 operate daily, one in each direction between Washington and Atlanta, a distance of 633 miles. On Tuesday, Thursday, and Sunday of each week, train No. 1 operates westbound beyond Atlanta to New Orleans, La. On Mondays, Wednesdays, and Fridays of each week, train No. 2 operates eastbound from New Orleans to Atlanta and thence to Washington, D.C. The distance between Atlanta and New Orleans is 521 miles and the total distance between Washington and New Orleans is 1.154 miles. The timetable of the "Southern Crescent" is attached in appendix A.

When the National Railroad Passenger Corporation commenced operations in 1971 Southern opted to continue providing intercity passenger service. By this decision Southern was obligated by law to continue to operate all of its then existing intercity passenger service through December 31, 1974.

Since December 1974, Southern has attempted to reduce its mounting losses attributable to its passenger train operations in four proceedings which have altered or discontinued service between Washington and New Orleans and to modify schedules to make the remaining service more attractive to the rail passenger public by establishing more desirable departure and arrival times along the "Southern Crescent" route.[2]

The minimum consists of train Nos. 1 and 2 between Washington and Atlanta includes one baggage coach combination, a baggage crew dormitory car, two coaches, two sleeping cars, one lounge sleeping car, and a dining car. On days when trips are scheduled between Washington and New Orleans, train Nos. 1 and 2 handle two additional coaches and one additional sleeping car providing through train service between New York and Los Angeles by connections with Amtrak trains at Washington and New Orleans. The minimum consists of train Nos. 1 and 2 operating between Atlanta and New Orleans includes one baggage coach combination car, two coaches, two sleeping cars, one dining and a "Dome" car. On the average, train Nos. 1 and 2 operate with 11 cars between Washington and Atlanta and 9 cars between Atlanta and New Orleans.[3]

Four locomotives are used for each segment of the trip of train Nos. 1 and 2 between Washington and Atlanta in each direction and between Atlanta and New Orleans in each direction. The train crew consists of an engineer, a fireman, a conductor, a baggageman, and a flagman. For the operation of train Nos. 1 and 2 between Washington and Atlanta, crew changes are made in each direction at Monroe, Va., Salisbury, N.C., and Greenville, S.C. A total of four conductors, four engineers, four firemen, three flagmen, and three baggagemen are required to operate the train between Washington and Atlanta. The trains operate between Washington and Atlanta with a dining car steward, a waiter in charge of the lounge car, two dining car crooks, two dining car waiters, two sleeping car porters, and six train porters attending coaches. A crew change of three train porters is made at Salisbury, N.C. For the operation of train Nos. 1 and 2 between Atlanta and New Orleans, crew changes are made in each direction at Birmingham, Ala., and Meridian, Miss., requiring a total of three conductors, three engineers, three firemen, three flagmen, three baggagemen, in addition to one dining car steward, one dining car cook, one dining car waiter, two sleeping car porters, and two train porters. Sixty-four employees are required to operate train Nos. 1 and 2 round trip between Washington and Atlanta and 44 additional employees are required to operate these trains round trip between Atlanta and New Orleans. When additional equipment is added to the train for special travel groups or holiday peak travel periods, additional train personnel is required.

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[2] F.D. No. 27829, *Southern Railway Discontinuance of Trains 7 and 8 Between Washington, D.C. and Lynchburg, Va.*, (proceeding discontinued April 16, 1975); F.D. No. 27827, *Southern Ry. Co. Changes in Train Service*, embracing F.D. No. 27828, *Southern Railway Company Discontinuance of Trains Nos. 5 and 6 Between Atlanta, Ga., and Charlotte, N.C. and Changes of Service Between Washington, D.C. and Charlotte, N.C.*, 348 I.C.C. 225 (1975); and F.D. No. 28207, *Southern Ry. Co.—Discontinuance of Trains* 348 I.C.C. 716 (1976).

[3] The consist of the train from New Orleans to Atlanta on June 16, 1978 included four EMD diesel E-8A locomotives; one baggage dormitory; four 52-seat coaches; one 54-seat coach; two sleepers with 10 roomettes; and six 6 double bedrooms; one sleeper with 10 roomettes; and 6 double bedrooms (Amtrak); one sleeper with 11 double bedrooms; one dining car (9 tables); and one "Dome" car (terminated at Atlanta). On arriving at Atlanta, the train first stopped at the yard limits where the "Dome" car was disconnected. The train proceeded to the Peachtree Station where passengers were received and discharged. During this stop, the four EMD E-8A locomotives were replaced. Southern currently maintains 17 EMD E-8A locomotives. At Atlanta, five additional passenger cars and one business car were connected to the rear of train. Consist of the train from Atlanta to Washington on June 17, 1978: four EMD diesel E-8A locomotives; one baggage dormitory; five 52-seat coaches; two 54-seat coaches; two 10-R, 6DB sleepers; four 10R, 6DB sleepers (Amtrak); one 11 DBR sleeper; one dining car (11 tables); one DR, MR, lounge sleeper; and one business car.

The only railroad interlining passengers with train Nos. 1 and 2 is Amtrak at Washington, D.C., Charlottesville, Va., Birmingham, Ala., and New Orleans, La. For the 3-month period October-December 1977, 17,078 passengers interlined with Amtrak from train Nos. 1 and 2 at Washington, 79 at Charlottesville, 33 at Lynchburg, 81 at Birmingham, and 705 at New Orleans. Since Amtrak changed its schedule in January 1978, there is no longer a reasonable connection at the Lynchburg point.

The 1970 populations and the January 1975 estimated populations of those points served by Southern between Washington and New Orleans are as follows:

Name of community	1970 population	Estimated January 1, 1975 population
Washington, D.C.	756,510	715,000
Alexandria, Va.	110,927	116,000
Culpeper, Va.	6,056	----------
Charlottesville, Va.	38,880	38,700
Monroe, Va.	500	----------
Lynchburg, Va.	54,083	52,300
Danville, Va.	46,391	45,400
Greensboro, N.C.	144,076	158,000
High Point, N.C.	63,229	67,000
Salisbury, N.C.	22,515	22,100
Charlotte, N.C.	241,178	283,000
Gastonia, N.C.	47,142	50,800

Name of community	1970 population	Estimated January 1, 1975 population
Spartanburg, S.C.	44,546	46,300
Greenville, S.C.	61,436	64,000
Clemson, S.C.	[1]5,578	----------
Toccoa, Ga.	6,971	----------
Gainesville, Ga.	15,459	15,700
Atlanta, Ga.	495,039	455,000
Anniston, Ala.	31,533	29,400
Birmingham, Ala.	300,910	281,000
Tuscaloosa, Ala.	65,773	77,900
Eutaw, Ala.	2,805	----------
Livingston, Ala.	2,358	----------
Meridian, Miss.	45,083	45,000
Laurel, Miss.	24,145	22,800
Hattiesburg, Miss.	38,277	40,300
Purvis, Miss.	1,860	----------
Poplariville, Miss.	2,312	----------
Slidell, La.	16,101	19,500
New Orleans, La.	593,471	569,000

SOURCE: Rand McNally & Company 1975 Commercial Atlas & Marketing Guide (106th Edition).

[1] Not including Clemson University, 8,400.

The number of revenue passengers carried on the "Southern Crescent" between Washington and New Orleans for the years 1975, 1976 and 1977 is as follows:

Washington, D.C.—Atlanta, Ga.[1]

	Train No. 1	Train No. 2	Total
1977	77,275 (202.3)	70,825 (188.9)	148,100 (195.6)
1976	73,535 (195.1)	66,636 (174.9)	140,171 (184.9)
1975	74,069 (197.5)	63,587 (170.9)	137,656 (184.3)

Atlanta, Ga.—New Orleans, La.[1]

	Train No. 1	Train No. 2	Total
1977	22,184 (142.2)	23,014 (147.5)	45,198 (144.9)
1976	20,894 (133.1)	23,199 (147.7)	44,093 (140.4)
1975	23,702 (151.9)	23,817 (151.7)	47,519 (151.8)

[1] Average number of passenger per trip show in parenthesis.

EMPLOYEES

There are 328 railroad employees who would be affected by the discontinuation of the "Crescent" passenger service. Of these, 170 are on-train employees and 158 are nontrain employees. The latter nontrain employees include ticket clerks, storehouse laborers and engine and car maintenance people. The train engine service people including conductors, switchmen, and trainmen will exercise their seniority rights and go to freight service. Some others will transfer to comparable jobs. As the domino effect of the exercise of seniority rights goes down the seniority list, the most junior employee would be offered positions which would ordinarily have been filled with newly hired persons. Other junior employees would go to the "extra board" which is a reserve list or roster of people who fill in for regular employees or work other than regularly assigned trains. Southern has concluded that a number of the employees now engaged in the passenger service related employment will elect to exercise their right to retire.Those train and engine employees who transfer to the freight service through the exercise of seniority will do so at comparable earnings. Of the 158 nontrain employees 14 are office clerks and storehouse laborers, 38 are line and road clerks and station porters, 39 are train repairemen, 38 are car repairmen, 10 are diesel mechanics and 3 are motor mechanics. These nontrain employees will be able through exercise of seniority or transfer to go to comparable jobs and maintain their employment relationship with an interruption calculated by Southern not to exceed 13 months during which they will receive the benefit of protective conditions. Many of the remaining on-train employees such as cooks, waiters, train porters and sleeping car porters may also be transferred to freight service or to clerical jobs. Twenty dining car employees including chefs, waiters and stewards would be the hardest to place within the company. Some would probably retire because of age and others would negotiate a settlement with separation pay. Southern maintains that the younger persons would be trained for new positions. Thirty-four sleeping car porters would mostly be trained as switchmen or trainmen. Since Southern hires 2,000 employees a year, about 10 percent of its work force, of this 10 percent approximately half of the newly hired are destined for engine service. In view of the known attrition rates most all passenger service employees who will elect to remain in railroad service can be placed. Those employees who would have their term of employment disrupted would take protection pay during the time of the disruption.

Various labor union representatives of the United Transportation Workers, Brotherhood of Locomotive Engineers, Railway Labor Executives Association, the Railway Employees and the Shop Craft Labor Unions which are affiliated with it and the Sheet Metal Workers' International Association have requested the imposition of some protective labor conditions.

PROTESTANT'S POSITION

The National Association of Railroad Passengers (NARP), is the principle protestant to Southern's discontinuance application[4]. NARP is an Association dedicated to the retention, development, and improvement of rail passenger service wherever it is needed and useful. NARP gets no financial support from government, railroads, Amtrak, or railroad labor. Its activities are motivated by the belief that trains are more fuel efficient than airplanes and are better able than buses to attract passengers from automobiles. NARP has appeared before in various Commission proceedings on behalf of the traveling public, including Southern's last request to reduce service of the "Crescent." NARP emphasized that the "Southern Crescent" case is not the normal section 13a proceeding because of the general consesus that Amtrak will eventually operate the "Crescent." NARP opined that this proceeding is Southern's response to its inability to obtain a satisfactory contract with Amtrak; that a favorable decision by the Commission on Southern's request would place it in a stronger bargaining position with Amtrak while an unfavorable decision would give Amtrak an agreement more favorable to it; that a grant of Southern's request effective August 6 would almost certainly mean a gap in the service causing irreparable harm to ridership, revenues and, possibly, Amtrak's ability to provide the service. NARP stressed that the "Crescent's" Washington-Atlanta ridership has increased 8 percent over 1975 in spite of minimal advertising; that Southern has failed to develop mail traffic enjoyed by Amtrak; that the "Crescent's" load factor is considerably lower than that of Amtrak and airlines serving the area; that the Secretary of Transportation's preliminary Reexamination of the Amtrak Route Structure recommends Amtrak operation of the "Crescent" on a daily basis; that Southern has failed to increase revenues through innovative pricing and marketing practices; and that some of Southern's costs are overstated or due to unnecessarily expensive operating practices. NARP maintained throughout the hearings that discontinuance of the "Crescent" would not only leave such major population centers as Atlanta, Charlotte, Greenville-Spartanburg, and Greensboro without any rail passenger service but that alternate transportation was unsuitable for various reasons. NARP members and casual travelers all agreed that Southern's service was preferable to that of Amtrak but Amtrak service was better than none at all and no gap should be allowed.

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[4] Appearances at Washington were entered by Railway Employee's Department and Sheet Metal Workers' International Association, and Railway Labor Executives' Association. The United Transportation Union witness testified at Washington. State Directors in all states along the route presented witnesses representing these unions and participated in the proceedings by cross-examination of Southern's witnesses at various locations. Only the Brotherhood of Locomotive Engineers were represented by counsel at the hearings in Toccoa, Grainsville and Atlanta, Ga.

COST EVIDENCE

Southern's cost witness[5] introduced in exhibit 8, appendix FAL-3 (sheet 1 of 3), a study which shows total revenues and direct expenses for operating train Nos. 1 and 2 for the calendar year 1977. Sheets 2 and 3 represent similar analysis for the calendar years 1976 and 1975, respectively. Testimony of Southern's cost witness, was that, in the year 1977, the only scheduled passenger service Southern had were train Nos. 1 and 2. Southern's witness provided a detailed explanation of the revenues and avoidable expenses claimed for the year 1977 during a review of the underlying workpapers pertaining to 1977. Accordingly, the summary will be confined to the year 1977, attached as appendix B.

The table below is a recap of Southern's computations of total revenues and direct expenses of operating train Nos. 1 and 2 for the calandar year 1977:

Item	Washington Atlanta	Atlanta New Orleans	Total
Passenger revenues	$4,387,900	$1,085,100	$5,473,000
Direct expenses	9,240,500	2,855,000	12,095,500
Net direct loss	4,852,600	1,769,900	6,622,500

Southern's cost witness contends that since the proposed discontinuance of train Nos. 1 and 2 would end all passenger service now performed by Southern, the net revenue savings that would have been realized had train Nos. 1 and 2 not operated during 1977 would have been $6,622,500. Southern's cost witness also emphasized during testimony that in determining the avoidable loss related to the operations which Southern seeks to discontinue, he deliberately restricted his calculations to expenses directly related to the operations involved and did not attempt to include estimates of reductions in other expenses which may be affected by the subject discontinuance. For example, the witness stated that he did not attempt to determine reductions in the following categories of expenses, although he velieved some of these categories may be reduced if Southern's application is granted:

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[5] Frank A. Luckett, Assistant Comptroller, Southern Railway System.

Maintenance of way—tracks and structures;
Maintenance of way—supervision, depreciation, retirements;
Maintenance of equipment—supervision, depreciation, retirements;
Transportation—supervision, train dispatching, and various overhead accounts;
All taxes, except payroll;
All fixed charges, *e.g.*, bond interest.

Similarly, this witness testified that all revenues and expenses associated with business cars and excursion trains were excluded from his financial analysis of the operations of train Nos. 1 and 2. Finally, it was noted that no common expenses apportioned between freight and passenger service were included in any of the figures introduced by this witness.

Passenger revenues shown for the year 1977 represent the total earnings of train Nos. 1 and 2, generated from all revenue passengers handled. Southern's cost witness testified that these passenger revenues were extracted from computer runs which showed the origin and destination of the passengers, whether they moved first class or coach, the number of passengers, the revenue passenger miles, and the revenue applicable to each class of passengers. In Southern's exhibit 9 the witness summarizes that data for the year 1977.

The $7,200 "other" revenue figure shown for the year 1977 represents the revenue derived from the handling of baggage and newspapers. Specifically, Southern's cost witness stated that during the year 1977, the total baggage revenue accruing to the entire Southern Railway System was $3,015 while the revenue associated with the handling of newspapers, totaled $4,198. Since Southern's witness assumed that all of the aforementioned traffic moved on train Nos. 1 and 2, he included those revenues in the total passenger revenues accruing to train Nos. 1 and 2.

During cross-examination of Southern's witness in Washington questions about the difference in revenue figures shown in applicant's R-1 Annual Report filed with the Commission and the revenue figures contained in Southern's exhibit 8 for the year 1977 were voiced.

During testimony in New Orleans, La., a protestant witness argued that Southern had failed to develop the mail and express revenue potential of train Nos. 1 and 2. It was noted that Amtrak earns 9 1/2 percent of its passenger revenue in mail and express revenue. The protestant's witness contended that if Southern earned proportionately as much, train Nos. 1 and 2 would have earned another $500,000 in 1977.

In Southern's rebuttal to opposition of its cost evidence, the cost witness testified that the difference in revenues shown in applicant's R-1 Annual Report and those shown in Southern's exhibit 8, was due to the exclusion from exhibit 8 of revenues associated with excursion trains such as the "School Board Patrol Special," "Carter Inaugural Special," and others. Since the revenues accruing to Southern from the excursion trains are not attributable to operations of train Nos. 1 and 2, applicant's cost witness did not include those revenues in his passenger revenue figures shown in exhibit 8.

In response to protestant's witness, Southern's cost witness noted that the demise of mail and express services on passenger trains was the result of changes in the whole distribution complex associated with the mail and express business.

Southern's method of computing passenger revenues on the basis of only actual revenues accruing to train Nos. 1 and 2 is acceptable. Since the revenues accruing to Southern's excursion trains were not generated by train Nos. 1 and 2, applicant's exclusion of those revenues is proper.

With regard to protestant's concern for any potential mail and express revenue, it was established that the loss of these revenues was the result of the Post Office Department's location of distribution centers in the suburbs that are not served by any railroad track.

In constructing crew wages expenses for train Nos. 1 and 2, Southern's cost witness stated that they were developed according to the prevailing wage rates applicable to the calendar year 1977. Southern's witness avers that the figures arrived at for train Nos. 1 and 2 are the minimum wages that are applicable to the crews required to operate these trains and do not include any wages for overtime. It was noted that these minimum wage levels were computed on the operating assumption that these locomotive units were utilized between Washington, D.C., and Atlanta, Ga., and two locomotive units between Atlanta, Ga. and New Orleans, La. As further clarification of how crew wages were computed, applicant's cost witness provided a detailed explanation of the approach used for each of the various type crew members.

For example, an engineer working between Washington, D.C. and Monroe, Va., operating three locomotive units, would receive a minimum of $96.29 per trip. An engineer's basic wage was based upon the combined weight for all locomotives handled per trip, with each locomotive unit weighing approximately 250,000 pounds. Thus, for three locomotive units an engineer would receive a daily rate which on July 1, 1977 was 55.76 cents per mile for "weight on the driver" between 700,000 and 750,000 pounds. Since an engineer on the Washington to Monroe run gets the daily rate on a mileage basis for the entire distance, the 55.76 cents per mile would be multiplied by the mileage between Washington and Monroe of 170 miles to arrive at $94.79. In addition, an engineer would also receive $1.50 no-stop meal allowance for going through a division. Since an engineer crosses a division when he starts out at Washington and goes through Alexandria, Va., he gets $1.50 per trip. When this meal allowance is added to the daily mileage figure, the minimum Southern would have to pay each engineer on the Washington to Monroe run would be $96.29.

Southern's cost witness noted that the aforementioned calculations would be somewhat different for other locations on the "Southern Crescent" route due to differences in crew wage contracts.

Protestants' did not challenge Southern's development of crew wages.

The crew wages expense account for the minimum contract wages has no provision for overtime pay. They may be understated to a certain degree.

Southern's Executive Vice President of Operations also testified that the present crews operating train Nos. 1 and 2 will have the option of exercising their seniority rights to assume positions within the Southern system.

The present passenger employees will be utilized in other service on the Southern system in lieu of hiring new personnel. This affirms the avoidability of Southern's claim on crew wages. The amounts claimed by Southern's cost witness for crew wages is considered avoidable in the proceeding.

In computing the payroll taxes and vacation expenses associated with the crew wages Southern's cost witness employed a composite fringe benefit of 31.575 percent generated by the General Managers Association of Chicago Agreement for trainmen and enginemen. Southern's cost witness noted that this percentage applicable to trainmen and enginemen was 3.5 percent lower than the composite percentage applicable to other train employees, such as conductors and porters.

However, in order to avoid any confusion, the witness employed a conservative approach whereby he applied the 31.575 fringe benefit percentage to the wages of all passenger train employees.

Protestants' did not dispute or question applicant's cost witness on the computation of payroll tax and vacation expenses.

The calculation of payroll tax and vacation expenses related to actual crew wages has been developed in an acceptable manner. Since these expenses were computed through the use of a fringe fringe benefit percentage that is somewhat less than the actual percentage applicable to certain employees, they are understated by an unknown amount.

According to Southern's cost witness, crew members are paid $2 per meal per trip. In addition, crew members requiring lodging between Salisbury, N.C. and New Orleans, La., are also paid from $10.42 to $15.90 per day depending on the lodging location. Southern's witness noted that crew members requiring lodging between Washington, D.C. and Salisbury, N.C., stay at Southern facilities and are not paid any lodging allowance.

Protestants did not dispute or question Southern's computation of meal and lodging expenses.

Southern's computation of these expenses on the basis of actual costs incurred by train crews for meals and overnight lodging is reasonable. Moreover, it stands to reason that if passenger train Nos. 1 and 2 are discontinued and the affected employeees assigned to other service, the meal and lodging expenses incurred by these passenger train crews will be eliminated. Therefore, Southern's claimed avoidable expense figure for meals and lodging is acceptable.

During testimony, Southern's cost witness stated that expenses for servicing locomotives and train supplies were computed on the basis of the expenses billed directly "against" Southern by the "Washington Terminal Company" and the "New Orleans Passenger

Terminal." Southern's witness further testified that he did not include any costs whatsoever for labor or material expenses that may have been incurred by Southern Railway Company employees or Alabama Great Southern employees which would appropriately be included in these expense categories.

The specific records for which this data was extracted where the WT-19 report published on a monthly basis by the Washington Terminal Company and the New Orleans Passenger Terminal report also published on a montly basis. The particular amounts reflected in these reports for each month for servicing locomotives and train supplies and expenses were summarized to arrive at the expenses claimed by Southern's cost witness for these two categories for 1977. Tables 1 and 2 below are a recap of Southern's computations:

TABLE 1

Servicing locomotive expenses for 1977

Item	*Total*
Washington Terminal Company WT-19 report	$37,853
New Orleans Passenger Terminal report	23,305
Total	61,158

TABLE 2

Train supplies and expenses

Item	*Total*
Washington Terminal Company WT-19 report	$290,366
New Orleans Passenger Terminal report	185,482
Orkin—exterminators	37,200
Total	513,048

Since the expenses associated with the Washington Terminal Company and the New Orleans Passenger Terminal are calculated on the basis of the number of cars handled in and out of each facility, protestants questioned Southern's cost witness about the amount of expenses incurred by Southern business cars at each facility.

In reply to these questions about the inclusion of business car expenses, Southern's cost witness testified that business cars are not included in the car counts "in and out" of the Washington Terminal and the New Orleans Passenger Terminal. Moreover, it was noted that the expenses incurred by Southern business cars are billed directly to Southern separate from the expenses incurred by other Southern passenger cars.

Southern's cost witness reiterated that amounts claimed for servicing locomotives and train supplies and expenses were computed solely on the basis of the expenses billed directly against Southern by the Washington Terminal Company and the New Orleans Passenger Terminal. As further support of this position, Southern's cost witness stated that the cost of water used in servicing passenger locomotives and cars in Atlanta, Ga., and at other stations on the "Southern Crescent" route amounted to approximately $83,000 in 1977. However, Southern asserted that this expense was not included in the amount claimed for servicing locomotives or for that matter in any of the expense categories shown in exhibit 8.

Southern's calculation of expenses for servicing locomotives and train supplies and expenses have been developed in an admissible manner. However, since these expenses only account for amounts billed by the Washington Terminal Company and the New Orleans Passenger Terminal, they are understated to a certain degree. Testimony by Southern's cost witness during rebuttal relative to water used in servicing locomotives in Atlanta, Ga., corroborates the existence of this understatement.

Examination of the WT-19 reports for the Washington Terminal Company and the New Orleans Passenger Terminal reports for the year 1977, also authenticates the accuracy of the expenses claimed by Southern's cost witness for servicing locomotives and train supplies and expenses. Moreover, these terminal reports affirm that all expenses associated with Southern business cars have been excluded from the two expense categories.

Finally, since all Southern passenger train operations will cease to exist upon discontinuance of train Nos. 1 and 2, all servicing of passenger locomotives and train supplies and expenses will be eliminated. Therefore, applicant's avoidable cost figures for servicing locomotives and train supplies and expenses are acceptable.

Even though some minor discrepancies exist in the expenses and revenues claimed as avoidable by applicant, it is clear that operation of the "Crescent's" train Nos. 1 and 2 resulted in a drain on the carrier's net operating income for the year 1977.

The $733,500 that Southern's cost witness stated for locomotive repairs for 1977 consist of the following items outlined in table 3 below:

TABLE 3

Locomotive repair expenses for 1977

Item	*Total*
Labor expenses	$248,886
Material expenses	416,900
Washington Terminal Company charges	50,794
New Orleans Passenger Terminal charges	16,940
Total	733,500

The labor expenses shown in table 3 represent those expenses associated with 12 Southern employees who currently work at Southern's "Hayne" passenger repair shop in Spartansburg, S.C. Similarly, the material expenses shown in table 3 reflect those expenses incurred in repairing locomotives at the facility. Since the Hayne shop will be eliminated after the discontinuance of train Nos. 1 and 2 and the affected employees transferred to the freight repair shop at the same location in lieu of hiring new personnel, these expenses would be avoidable.

With respect to the other expenses shown in table 3, Southern's cost witness maintained that only those expenses directly charged to the "Crescent" for locomotive repairs are reflected in the amounts claimed for the Washington Terminal Company and the New Orleans Passenger Terminal. The witness noted that if the proposed discontinuance is granted, Southern will cancel its contract with the Washington Terminal Company and the New Orleans Passenger Terminal. Thus, Southern will no longer incur any locomotive expenses at either of those facilities.

Protestant witness, a NARP official,[8] argued that locomotive repair expenses should be adjusted to reflect that the subject passenger locomotives are used on the special excursion trains Southern runs periodically. The witness maintained that the "Southern Crescent" should not be charged the entire cost of repairing passenger locomotives that benefit these excursion trains.

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[7] John R. Martin, Director, Region V, National Association of Railroad Passengers.

[8] Bob Clark, Jr., Chairman, Crescent Route Transcontinental Rail Services Research Committee of the Houston Chapter of the National Association of Railroad Passengers.

Another protestant witness, also a NARP official,[7] argued also that Southern has failed to provide and plan for new passenger locomotives. The witness contended that Southern's failure to do so contributed to the high maintenance costs incurred by Southern. However, the witness did not submit any evidence to support his contention that the purchase of new passenger locomotives could reduce maintenance costs.

In response to the NARP witness' statement concerning the use of passenger locomotives on special excursion trains, Southern's cost witness emphatically and clearly stated that *all* expenses applicable to excursion cars, office cars, special trains, and overhead were eliminated from the locomotive repair expenses reflected in exhibit 8. This witness noted that Southern employs responsibility accounting and cost center accounting which permits specific identification of expense attributable to a particular operation. Thus, Southern's cost expert was able to analyze locomotive repair expenses and eliminate all expenses related to locomotives used in movement of excursion cars, office cars, special trains and overhead.

In a matter unrelated to the specific protests addressing locomotive repair expenses, Southern's cost witness noted that these expenses were adjusted to reflect the use of fewer locomotive units between Atlanta and New Orleans. Specifically, Southern's cost witness explained that it was assumed that two locomotive units would be used on 50 percent of the trips and three locomotive units on the remaining 50 percent of the trips instead of three locomotive units on 100 percent of the trips as initially assumed in exhibit 8. On the basis of this assumed reduction in the number of locomotive units employed per trip between Atlanta and New Orleans, the witness demonstrated that locomotive repair expenses should be reduced 28 percent. Since locomotive repair expenses totalled $496,500 in 1977, a 28-percent reduction would amount to $139,000. However, the witness emphasized that in presenting this reduced figure he was not advocating or embracing the operation of train Nos. 1 and 2 with less than the four locomotive units now used.

The development of locomotive repair expenses on the basis of actual expenditures directly attributable to passenger operations, as derived from actual company records, is acceptable. Moreover, since the expenses attributable to excursion trains and office cars were not incurred in the operation of train Nos. 1 and 2, Southern's exclusion of those expenses is correct.

Since Southern plans to eliminate the passenger repair shop in Spartansburg, S.C., and terminate its contractual relationship with Washington Terminal Company and New Orleans Passenger Terminal if the proposed discontinuance is granted, it is clear that Southern's claimed locomotive repair expenses would be avoidable.

It should also be noted that the adjustment of locomotive repair expenses to reflect the use of fewer locomotive units between Atlanta and New Orleans is similarly acceptable. However, since four locomotive units are normally employed on each trip to train Nos. 1 and 2 between Washington and Atlanta and between Atlanta and New Orleans Southern's adjustment may understate the locomotive repair expenses attributable to train Nos. 1 and 2.

With regard to the purchase of new locomotives, NARP is in all likelihood correct that new equipment would reduce Southern's locomotive repair expenses to an extent. However, in light of the cost of this new equipment, it is doubtful that Southern would realize any savings in passenger operating expenses.

Passenger car repair expenses were calculated by first employing the expense amount shown in Southern's R-1 Annual Report for account 317 for 1977 of $4,485,430. The payroll taxes applicable to the labor portion of those expenses shown in account 317 were subsequently added to arrive at the total passenger car repair expenses including payroll taxes for 1977 of $4,886,000. Southern's witness then subtracted from this total the labor and material passenger car repair expenses associated with the special excursion trains periodically run by Southern of $920,622. Since these excursion trains will continue to be run if the proposed discontinuance is granted, the witness concluded that the passenger car repair expenses attributable to these excursion trains would not be avoidable. As such, the witnesss argued that only claimed passenger car repair expenses incurred by train Nos. 1 and 2 would be savable upon discontinuance.

Similar to the argument raised in regard to locomotive repair expenses, protestant's witness contended that passenger car repair expenses should likewise be adjusted to reflect that passenger cars are used on the Southern excursion trains.

Protestant's witness, on the other hand, also argued that Southern's failure to purchase new passenger cars contributes to the high maintenance costs incurred in repairing Southern's existing fleet of older passenger cars.

Both protestant witnesses attempted to establish that repair costs associated with Southern's business cars were included in the expenses claimed by applicant's cost witness for passenger car repairs. However, neither witness offered any specific evidence to substantiate their positions.

Finally, one NARP witness maintained that the 52.8-percent increase in passenger car repair expenses claimed by Southern's cost witness from 1975 to 1977 is "out of line." The witness noted that Southern operated a total of eight passenger trains until May 31, 1975, in contrast to only two for the entire year 1977.

In rejoinder to the suppositions of NARP's witnesses, Southern's cost witness reiterated that all expenses applicable to excursion cars, office cars, special trains, and overhead were eliminated from the passenger car repair expenses reflected in exhibit 8. Southern's witness noted that a business car is designated as work equipment and maintenance expenses attributable to business cars is charged to I.C.C. account 326, Work Equipment Repairs and not to account 317, Passenger Car Repairs.

With regard to the 52.8-percent increase in expenses between 1975 and 1977, applicant's cost witness asserts that on arriving at the last segment of any business and making an adjustment or eliminating it, an extra saving is produced. Moreover, since Southern operated other passenger trains in 1975 and 1976, passenger car repair expenses incurred in those years would have been prorated to all trains. Thus, train Nos. 1 and 2 would not have been charged with all of the expenses as they were in 1977.

Southern's cost witness also pointed out that the total passenger car repairs for all trains from 1975 to 1977 increased only 39 percent, as compared to the 52.8 percent cited by a NARP witness for train Nos. 1 and 2.

Nonetheless, Southern's witness concluded that the increase in car repair expenses for train Nos. 1 and 2 is basically attributable to inflation and the fact that this is the last passenger service.

Southern's calculation of passenger car repair expenses on the basis of actual expenditures directly assignable to passenger operations, as derived from actual company records, is admissiable. Similarly, the exclusion of expenses applicable to excursion cars, office cars, special trains, and overhead is also acceptable.

Furthermore, Southern's cost witness is correct that repair expenses attributable to business cars is assigned to account 326, Work Equipment—Repairs.

Examination of Southern's R-1 Annual Report filed with the Commission and Southern's underlying workpapers also corroborate the accuracy of the expenses claimed by applicant's cost witness for passenger car repairs for 1977. In light of the comments made in connection with locomotive repair expenses regarding elimination of the passenger repair shop and cancellation of contracts with the Washington Terminal Company and the New Orleans Passenger Terminal, it is evident that expenses claimed for passenger car repairs would likewise be avoidable.

In connection with the purchase of new passenger cars, it is plausible that new equipment would reduce Southern's passenger car repair expenses to some degree. However, in view of the magnitude of the cost to replace Southern's 84 passenger cars, it is questionable if Southern would realize any savings in passenger operating expenses. In fact, since Southern's current equipment trust rate is over 8 percent, the interest for 1 year alone would almost equal the amount of passenger car repairs claimed by Southern's cost witness for the year 1977.

Finally, the NARP witness is correct that passenger car repair expenses associated with train Nos. 1 and 2 increased approximately 53 percent from 1975 to 1977. However, as noted by the witness, Southern operated a total of eight passenger trains until May 31, 1975. Thus, as stated by Southern's witness, passenger car repair expenses were apportioned in 1975 and 1976 to all trains in operation during those years.

However, for the calendar year 1977, only train Nos. 1 and 2 were in operation. As such, all of the overhead expenses associated with repairing passenger cars in 1977 were only attributable to train Nos. 1 and 2, whereas in 1975 and 1976 those same expenses were apportioned to a total of eight trains which included train Nos. 1 and 2. Consequently, Southern's witness is correct that on arriving at the last segment of any business, extra savings will be generated since all expenses associated with that segment including overhead expenses will be eliminated.

In computing the fuel expenses associated with the operation of train Nos. 1 and 2, Southern used a simulation analysis of the issue traffic which takes into account such factors as size, type and manufacturer's specification of locomotives, trailing loads, topography, speed, stops and starts, and other conditions affecting passenger train operations. The gallons of fuel thus calculated through the simulation for train Nos. 1 and 2 were then applied to the average cost per gallon of diesel fuel oil during 1977 of 38.096 cents. This resulted in a total fuel cost incurred in operations of train Nos. 1 and 2 during 1977 of $1,101,400.

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Southern's operation research witness stressed that studies of fuel consumption employing this same methodology were accepted by the Commission in previous cases (Finance Docket Nos. 27827, 27828, and 28207) involving operations of trains over a portion of the line involved herein. Southern's operation research witness also noted that Southern conducted a study in 1973-1974 at the request of the Federal Railroad Administration in which applicant actually metered fuel consumption on train Nos. 1 and 2 for 12 runs between Washington and Atlanta. The results of this study found the variance between actual fuel used and that derived from a simulation of the same number of runs to be less than 1.5 percent.

Protestant witness argued that Southern's 1977 expenditures of $1,168,000 for fuel could have been reduced substantially without impairing the operation of the train and without interference with Southern's freight service. Since the train now operates with four locomotive units over the entire route, the witness maintained that reducing the number of locomotive units except for the most heavy loads could be achieved without creating a timekeeping problem. In support of this contention, the witness submitted a list of nineteen dates between December 21, 1974 and December 27, 1977 on which the train operated between Washington and Atlanta with less than four locomotive units and arrived in Atlanta on time on all but three trips.

This NARP witness noted that even Southern's cost witness stated that $147 could be saved during each Washington-Atlantia trip by using three locomotive units instead of four and $302 could be saved by using only two locomotive units. Consequently, this protestant witness asserted that on the basis of 720 trips, train Nos. 1 and 2 could be operated at a savings of between $105,000 and $217,000 by a change in locomotive units between Washington and Atlanta. With respect to the Atlanta-New Orleans segment, the witness noted that the carrier's witness stated $211 could be saved on each trip by operating with two locomooive units. Thus, the NARP witness contended a reduction in locomotive units on the Atlanta-New Orleans segment would result in annual savings of at least $65,000. However, the NARP witness acknowledged that on those rare occasions when train length required, an extra unit could be employed. The witness concluded that substantial fuel savings could be achieved by a reduction in the number of locomotive units utilized in train Nos. 1 and 2.

NARP's witness also argued that on each occasion that train Nos. 1 and 2 ran in two sections to accommodate Southern office cars it has resulted in addition fuel expense.

Similarly, the deadheading of cars on train Nos. 1 and 2 increases the fuel needed for operation. According to the NARP witness, this affects fuel efficiency and increases fuel expenses.

Finally, the protestant's witness argued that the high degree of excess capacity of train Nos. 1 and 2 on many occasions decreases fuel efficiency and increases costs.

In order to determine the feasibility of NARP's argument that reduction of locomotive units could reduce fuel expenses, Southern's witness stated that reduction in locomotive units was considered to be reasonable as shown in table 4:

TABLE 4

Reduction of locomotive units per train

Number of cars per train	*Number of locomotives per train*
	Units
8 or less	2
9 to 12	3
Over 12	4

The witness stressed, however, that Southern's management was opposed to this reduction in locomotive units because of the service reliability problems.

Having developed the aforementioned premise, Southern's witness determined the number of movements in 1977 associated with the categories displayed in table 4 above. Table 5, as follows, illustrates the results of this analysis:

TABLE 5

Number of cars per movement in 1977 between Washington and Atlanta

Number of cars per train	*Number of movements*
8 or less	173
9 to 12	424
Over 12	160

Southern stated that in determining the number of cars per train all office cars and deadhead cars were excluded.

On the assumption that 2 locomotive units were used on each of those trips with 8 cars or less, 3 units on the trips with 9 to 12 cars, and 4 units on the trips with over 12 cars, Southern's witness calculated the fuel cost reduction between Washington and Atlanta to be $119,200.

Between Atlanta and New Orleans Southern's cost witness performed a similar calculation. However, for this particular analysis, Southern's witness assumed that 50 percent of the movements were with eight cars or less using two locomotive units and the remaining 50 percent of the movements were with nine cars or more using three locomotive units. On the basis of this premise, the witness computed the fuel cost reduction between Atlanta and New Orleans to be $54,700.

For the combined movements from Washington to New Orleans, Southern's witness found that fuel costs could be reduced approximately $174,000.

With respect to the allegation heard in the hearings that Southern office cars have occasionally caused train Nos. 1 and 2 to run in two sections, thereby increasing fuel costs, Southern's witness testified that a through analysis was made of the 27 second sections operated by train Nos. 1 and 2 during 1977. On the basis of this analysis, Southern's cost witness concluded that the maximum number of trips in which an office car may have caused a second section would be four. The additional cost associated with these four trips would have been $14,100 composed of wages, payroll taxes, meals and lodging, and fuel expenses.

Southern's method of calculating fuel expenses on the basis of a fuel simulation analysis is acceptable. In fact the Commission accepted this identical methodology in Finance Docket No. 27827, *Southern Ry. Co. Changes in Train Service, supra,* and Finance Docket No. 28207, *Southern Ry. Co.—Discontinuance of Trains, supra.* Furthermore, in a test conducted for the Federal Railroad Administration, Southern found the variance between actual fuel used and that derived through this simulation model over the route of train Nos. 1 and 2 between Washington and Atlanta was only 1.5 percent.

Moreover, it stands to reason that if train Nos. 1 and 2 are discontinued, all passenger train fuel expenses will be eliminated and considered avoidable. This, of course, except fuel for excursion trains.

In connection with Southern's reduction in fuel expenses to reflect the use of fewer locomotive units, it should be noted that the methodology is reasonable. However, in view of the evidence that four locomotive units are generally employed on each trip of train Nos. 1 and 2 between Washington and Atlanta and between Atlanta and New Orleans, the adjustment will understate the actual fuel expenses attributable to train Nos. 1 and 2.

On the other hand, protestant's witness would be correct that any expenses attributable to the operation of second sections as a result of Southern office cars should be excluded from the expenses claimed for train Nos. 1 and 2. However, in light of the fact that it cannot be established without some doubt that such sections did operate as a result of these office cars, protestant's argument is not well taken. Moreover, even if it were factually established that office cars caused the operation of second sections on those 4 days estimated by Southern's cost witness, the $14,100 in expenses associated with these second sections would not change the fact that train Nos. 1 and 2 incurred an avoidable loss of $6.6 million in 1977.

Southern's cost witness testified that the joint facility charges incurred at Washington Terminal and the New Orleans Union Passenger Terminal were based on the actual "in and out" car counts associated with each facility. However, it was noted these joint facility charges are actually composed of two parts. For example, at Washington Terminal the following charges were incurred in 1977 as shown in table 6 as follows:

TABLE 6

Actual Washington Terminal charges for 1977 as reflected on the WT-19 report

Item	*Amount*
User charge	$441,011
Amtrak ticket sales	56,356
Total	497,367

Southern's cost witness indicated that the Washington Terminal ticket sales charge was based on a contract with Amtrak. It was also stressed by Southern's cost witness that total joint facility charges are apportioned to the tenants based upon the extent each tenant uses the Washington Terminal facility and the New Orleans Union Passenger Terminal facility. Thus, if the tenants do not use the facility, they do not incur any charges.

Protestant argued that the Washington Terminal and New Orleans Union Passenger Terminal expenses should be adjusted to the extent that the "in and out" car count at each facility include business, deadhead, and excursion cars. It is protestants' contention that inclusion of expenses incurred by these cars at Washington Terminal and New Orleans Union Passenger Terminal was improper and they questioned storage charges for business cars at Washington Terminal.

Southern's cost witness acknowledged that the "in and out" car count for the Washington Terminal Company did include excursion and deadhead cars. However, this count did not include business cars. While it was the contention of Southern's witness that the expenses of deadhead cars were properly assignable to train Nos. 1 and 2, a conservative approach was employed and all expenses associated with deadhead and excursion cars were eliminated from the amount claimed for the Washington Terminal Company for 1977. Specifically, Southern's cost witness noted that the Washington Terminal Company expenses were reduced by $33,000 in 1977. With regard to the question of storage charge for business cars, Southern's cost witness maintained that there is no charge for storage of any car at the Washington Terminal facility unless it is a nonrailroad privately owned car.

Southern's calculation of expenses for the Washington Terminal Company and the New Orleans Union Passenger Terminal on the basis of actual charges billed directly against Southern is acceptable. Examination of the Washington Terminal, WT-19 montly reports and the New Orleans Union Passenger Terminal monthly reports for 1977, respectively, verifies that Southern's cost witness only claimed those user charges and Amtrak ticket sales expenses incurred at each facility. Moreover, these terminal reports also verify that all expenses associated with Southern business cars have been excluded from the aforementioned two expense categories. In addition, the WT-19 report demonstrates that there are no storage charges for business cars at the Washington Terminal facility except for nonrailroad owned private cars.

With regard to the inclusion of Washington Terminal Company expenses associated with excursion cars, protestants are correct that inclusion of these expenses is improper. Since the expenses attributable to excursion cars at the Washington Terminal facility were not incurred in the operation of train Nos. 1 and 2, those expenses should be eliminated.

On the other hand, Southern's cost witness is correct that expenses associated with the movement of deadhead cars included in the operation of train Nos. 1 and 2 are properly assignable to the expenses attributable to train Nos. 1 and 2. Irrespective of whether it is freight or passenger operations, railroads oftentimes deadhead cars out of necessity to particular locations to satisfy user demand or some other need. Thus, the deadheading of cars is as much a part of the operation of train Nos. 1 and 2 as is the operation of revenue cars on those trains. Consequently, the exclusion of expenses associated with deadhead cars, will understate the actual expenses incurred by train Nos. 1 and 2 at the Washington Terminal facility in 1977.

During the hearings, Southern's cost witness stated that joint facility charges attributable to the Alexandria Station were based on the number of stops at that facility. According to Southern's witness the following charges were incurred in 1977 in connection with the Alexandria Station as shown in table 7 below:

TABLE 7

Actual Alexandria Station charges for 1977

Item	*Amount*
User charge	$4,919.84
Ticket sales	26,793.00
Total	31,712.84

With regard to the block "D" charges, Southern's witness maintained that these expenses were based on the number of car-miles Southern cars traveled that segment of track. Southern's cost witness stressed that only those expenses directly billed against Southern by the Richmond, Fredericksburg and Potomac Railroad for Southern cars moving over that segment of track are reflected in exhibit 8. The witness commented that had Southern cars not moved over this track, Southern would not have incurred any expenses. Thus, Southern's cost witness concluded that the block "D" expenses would be 100 percent avoided if the proposed discontinuance is granted. Southern indicated that the same would be true for the Alexandria Station if train Nos. 1 and 2 were discontinued.

Southern was challenged by protestants concerning the inclusion of expenses associated with business, deadhead, and excursion cars and the charges incurred by Southern for using the Alexandria Station, block "D" track, and the inclusion of any car miles attributable to freight cars in the car mile total associated with the block "D" track.

Protestant argued that it is improper for Southern to claim expenses that are actually payments paid to companies in which Southern has an interest. For example, one NARP witness noted that Southern has an ownership in the Richmond, Fredericksburg, and Potomac Railroad (RF & P), which in turn charges Southern for the use of the block "D" track. Thus, Southern is making a profit off the income of the RF & P through their ownership in the RF & P. The witness concluded that this equity interest should be excluded from the avoidable costs claimed by Southern for the year 1977.

Southern's cost witness in rebuttal reiterated that there were no business car expenses included in any expenses claimed for block "D" or the Alexandria Station for 1977. It was similarly acknowledged that excursion and deadhead cars are included in the car count and car-mile count associated with the Alexandria Station and block "D", respectively. However, Southern's witness stressed that there were no freight cars included in the block "D" car-mile count.

As a result of the aforementioned facts, Southern's cost witnesss adjusted the expenses claimed in 1977 for block "D" and the Alexandria Station to exclude all expenses associated with excursion and deadhead cars. Specially, the witness stated that block "D" expenses were reduced by $4,100 and Alexandria Station expenses by $100.

Southern's computation of expenses associated with the Alexandria Station and the RF & P block "D" track has been accomplished in a reasonable manner. Examination of Southern's underlying workpapers corroborates that Southern's cost witness only claimed those charges billed directly against Southern for use of the Alexandria Station and the RF & P block "D" track. Moreover, these underlying workpapers also verify that all expenses associated with Southern business cars have been excluded from the above two expense categories.

Southern's adjustment to eliminate expenses associated with excursion and deadhead cars from those expenses claimed for the Alexandria Station and block "D" are also reasonable.

However, as noted by a NARP witness, Southern holds an equity interest in the RF & P. Thus, in order to properly reflect the impact of Southern's interest in the RF & P, Southern's cost witness should have included any revenues derived by Southern as a result of this interest.

Nonetheless, since it cannot be established from the record or from underlying workpapers the amount of revenues that were derived by Southern from the RF & P in 1977, a "worst case" approach has been employed and the entire $52,000 claimed by the cost witness for block "D" for 1977 has been eliminated. Elimination of this entire amount does not change the fact that Southern incurred an avoidable loss of $6.6 million in 1977 from operation of train Nos. 1 and 2.

During the hearings, Southern's cost witness stated that only those labor and labor related expenses that would be avoidable were included in station expenses. The cost witness stressed that no material expenses were included in station expenses claimed for 1977 except for the Peachtree Station in Atlanta. The Peachtree Station will be closed down if the proposed discontinuance is granted and all expenses associated with this station eliminated.

Southern's cost witness noted that in calculating the labor portion of station expenses, a survey was made of all stations to specifically determine those wages and related expenses that would be avoidable if train Nos. 1 and 2 were discontinued.

A protestant witness stated that between 1976 and 1977 station expenses associated with train Nos. 1 and 2 increased 153 percent. An increase of such a magnitude, the witness argued, "seems" entirely out of line. The witness noted that the station expenses for the Washington to Atlanta segment are even more questionable. In Southern's exhibit 8, station expenses between Washington and Atlanta for 1976 were claimed to be $167,300. In 1977, for the same segment, expenses increased to $612,200, an increase of 266 percent. In light of the facts between 1975 and 1977, the expenses at Washington Terminal increased 36 percent, New Orleans Union Passenger Terminal increased 43 percent, and Atlanta to New Orleans station expenses increased 29 percent. The NARP witness asserted that it is hard to imagine that the increase in station expenses for Washington to Atlanta could have been 266 percent in a single year.

Several protestants also argue that Southern has failed to take advantage of an economy in its Birmingham operation by sharing facilities with Amtrak. Protestants claim that Southern's insistance to maintain its own station in Birmingham not only results in increased costs, but also lengthens the operating time of train Nos. 1 and 2.

As to the increase in station expenses between 1976 and 1977, Southern's cost witness in rebuttal stressed that there were other passenger trains operated by Southern in addition to train Nos. 1 and 2 in 1976. Thus, in 1976 station expenses were prorated to all passenger trains operating during that year. In addition, Southern noted that in dealing with avoidable costs, if one train was eliminated, Southern would still incur station expenses since there would be other trains operating and using the same stations used by the discontinued train. Thus, Southern's cost witness concluded that since train Nos. 1 and 2 were the only passenger trains operating in 1977, all of the station expenses were charged to train Nos. 1 and 2, whereas in 1976 only a portion of these expenses were apportioned to train Nos. 1 and 2.

Southern's development of station expenses using only those labor and labor related expenses that would be avoidable if the proposed discontinuance is granted is acceptable. The exclusion of all material expenses from station expenses except for those associated with the Peachtree Station in Atlanta, Ga., is proper. Since the Peachtree Station is the only station that Southern will eliminate if train Nos. 1 and 2 are discontinued, the only material expenses that will be avoidable will be those associated with the Peachtree Station.

Since Southern has stated that all affected employees will be used elsewhere on the Southern system in lieu of hiring new personnel, it stands to reason that the labor expenses included in the station expenses claimed for 1977 will be avoidable.

With regard to the joint use of the Birmingham station, it was stated by Southern's transportation planning witness that during negotiatons with Amtrak in 1972 concerning the use of Amtrak's Birmingham facilities, it was determined that it would be cheaper for Southern to operate a separate facility than a joint facility with Amtrak. Thus, protestants' argument that Southern failed to take advantage of an economy in its Birmingham operation by sharing facilities with Amtrak is without foundation.

Finally, the NARP witness is correct that station expenses associated with train Nos. 1 and 2 increased approximately 153 percent from 1976 to 1977. However, as noted by Southern's witness, there were other passenger trains operated by Southern in addition to train Nos. 1 and 2, in 1976. Thus, in 1976 station expenses were prorated to all passenger trains in operation during that year. This resulted in train Nos. 1 and 2 being charged with less of the overhead costs.

On the other hand, during 1977, train Nos. 1 and 2 were the only passenger trains operated by Southern. Consequently, station expenses were no longer apportioned but charged in total to train Nos. 1 and 2, whereas in 1976 only a portion of those expenses were apportioned to train Nos. 1 and 2 which accounts for the seemingly large increase in expenses between 1976 and 1977.

As stated in Southern's exhibit 8, the dining car net loss reflects the excess of expenses over revenues generated in dining car service. Table 8, as follows, is a recap of applicant's computation of the dining car net loss associated with train Nos. 1 and 2:

TABLE 8

Computation of the dining car net loss for train Nos. 1 and 2 for 1977

Item	Amount	
Revenue	....	$587,983
Expenses:		
Labor and material	$1,225,711	....
Fringe benefits	134,584	....
Less nonavoidable expenses:		
Labor	- 44,600	....
Material	- 29,935	....
		1,285,760
Net loss	....	697,777

Southern's cost witness noted that the nonavoidable expense items in table 8 reflect the wage and material expenses associated with one employee in both Washington, D.C. and Atlanta, Ga., that would be retained by Southern if the proposed discontinuance were granted.

A protestant witness asserts that the dining car net loss should be reduced to reflect the revenue contribution from business employees paying for meals. Since it appears that for every meal served in the diner the Southern Railroad realized a loss, the NARP witness contends that the revenues derived from the employees payment for meals should be credited to the "Southern Crescent" revenues.

This NARP witness questioned the increase in dining car net losses stated by Southern's cost witness on the Atlanta-New Orleans segment from 1976 to 1977. The protestant witness noted that between Washington and Atlanta, the dining car net loss only increased 9.8 percent in 1976, and 10.9 percent in 1977. However, between Atlanta and New Orleans, the witness disclosed that while the dining car net loss increased 13.3 percent in 1976, it increased 105 percent in 1977.

In response to the NARP witness' argument concerning dining car revenues, Southern's cost witness established that all revenues derived from Southern employee's for the payment of meals on train Nos. 1 and 2 have been included in the revenues attributable to dining car service. In connection with the increase in the dining car loss between 1976 and 1977 on the Atlanta to New Orleans segment, Southern's cost witness commented that this unusual relationship was caused by the methodology used in apportioning this expense between the Washington-Atlanta segment and the Atlanta-New Orleans segment and explained that the dining car net loss claimed for 1977, for the Atlanta-New Orleans segment reflected the actual loss incurred by the Alabama Great Southern Railroad which only operates train Nos. 1 and 2 between Birmingham and New Orleans. In 1976, however, this cost witness stated that since other passenger trains were operated, the total dining car net loss was apportioned to all trains and then the dining car net loss associated with train Nos. 1 and 2 was separated between the Washington-Atlanta segment and the Atlanta-New Orleans segment on a revenue passenger-mile basis. This method of apportioning the dining car net loss in 1976 accounts for the apparently unusual increase in this loss between 1976 and 1977.

Southern's method of calculating the dining car net loss for 1977 on the basis of only those actual revenues and expenses attributable to dining car operations on train Nos. 1 and 2 is acceptable. Moreover, since it has been stated that all of the affected employees will be eliminated through either attrition or by placing employees elsewhere in lieu of hiring new personnel, it is clear that the labor portion of dining car expenses will be avoidable. Similarly, since all passenger operations will cease to exist if train Nos. 1 and 2 are discontinued, it is evident that the material expenses associated with dining car operations would also be avoidable.

Southern's inclusion of revenues attributable to business employees in the dining car net loss claimed for the year 1977 is proper. Since these revenues were derived from the operation of train Nos. 1 and 2, it is correct that these revenues be assigned to train Nos. 1 and 2.

Finally, despite the existence of an unusual increase in the dining car net loss between 1976 and 1977, the fact that Southern's cost witness employed actual revenues and expenses in determining the net loss in 1977, negates any necessity to examine this increase since actual figures are always more accurate than prorated figures.

Southern's cost witness established that the switching costs contained in exhibit 8 for 1977 reflect only crew wages and fuel associated with the switching service required in connection with train Nos. 1 and 2 at Atlanta, Ga. Southern's witness noted that he did not include any expenses for repairs in the claimed switching expenses and explained that there are ten "tricks"[8] per week that are devoted exclusively to the switching of train Nos. 1 and 2 in Atlanta. Since this switching service will be eliminated if the proposed discontinuance is approved, Southern's cost witness concluded that the crew wages and fuel expenses associated with this service would be avoidable.

Protestants did not dispute Southern's development of switching expenses. However, protestants did question Southern as to whether it would be less expensive, on those days that train Nos. 1 and 2 operate from and to New Orleans, to operate straight through from origin to destination without any switching at Atlanta. Southern's cost witness acknowledged that if Southern could eliminate the switching operation in Atlanta, it could eliminate $200,000 in expenses. However, the witness qualified the statement by stressing that it is not known if the switching in Atlanta could be operationally eliminated. Southern's development of switching expenses in Atlanta, Ga., on the basis of actual crew wages and fuel expenses is admissible. Moreover, since all switching service in Atlanta will be eliminated if the proposed discontinuance is approved, it stands to reason that the expenses associated with this service will also be eliminated. Thus, the expenses claimed by Southern's cost witness for switching operations in Atlanta can be considered avoidable in this proceeding.

With respect to the operation of train Nos. 1 and 2 straight through from origin to destination, Southern's transportation planning witness stated that Southern currently maintains its passenger locomotive repair facility in Atlanta. Thus, it is evident that Southern must switch its passenger locomotives in Atlanta in order to have access to Southern's locomotive repair facility. In addition, it was also stated by Southern's transportation planning witness that the "Dome" car cannot go into the Washington Terminal since it will not clear through the tunnel at Washington. Thus, unless Southern would not operate a "Dome" car on train Nos.

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[8] "Trick" is slang for shift or tour of duty.

1 and 2, switching service would be required at some point on the "Crescent" route before the train reached Washington. It appears that the switching operations in Atlanta could not be eliminated.

According to Southern's exhibit 8, passenger sales and passenger accounting expenses are only claimed for the year 1977 (appendix FAL-3). Southern's cost witness maintains that if the proposed discontinuance is granted, these expenses would no longer be necessary because train Nos. 1 and 2 are the last remaining passenger trains operated by Southern.

Southern's witness noted that the railroad employs a cost center accounting system which specifically identifies expenses assigned to each designated center. Since passenger sales and passenger accounting are separate cost centers, Southern's cost witness explains that it is possible to identify the actual costs associated with these centers in 1977 which in turn would be eliminated if the subject proposal was granted.

Protestant's witness contended that the passenger sales and accounting departments are not only involved in the operation of train Nos. 1 and 2 but also in the operation of the Southern excursion trains. Thus, the witness argued that it seems unfair to charge the entire cost of the passenger sales and accounting departments to the "Southern Crescent." This witness also noted that the passenger sales and accounting departments are not located in Southern's Atlanta office complex but in a building in the very center of Atlanta about five blocks away. Since the witness assumed that the cost of the floor space in this removed building is higher than that for Southern's Atlanta office complex, the witness concluded that the passenger sales and accounting departments are burdened with higher fixed costs than the other departments.

In response to NARP's witness' assumption that the passenger sale and accounting departments are so burdened, Southern's cost witness established that the rent for the entire passenger office in that downtown building only amounted to $7,500 for the year 1977. Southern's cost witness noted that Southern currently maintains a number of other offices in the building.

In connection with the excursion trains, the carrier's cost witness stated that Southern employes an assistant to the president who currently handles all passenger sales and accounting associated with excursion trains. It was noted that arrangements for these excursion trains are usually handled by the sponsoring organization.

Since Southern currently employs a cost center accounting system, the cost witness noted that it is possible to identify only those expenses associated with passenger sales and accounting that would be avoidable if the proposed discontinuance is granted.

Southern's cost witness also stated that there were no expenses included in the amounts claimed for the passenger department in exhibit 8 for the General Manger of the Passenger Sales and Service department. Since this official will continue to be employed by Southern if the proposed discontinuance is approved, the salary will not be eliminated.

Southern's method of computing passenger sales and accounting expenses on the basis of actual expenditures directly attributable to passenger operations, as derived from actual company records, is acceptable. Since Southern plans to eliminate the passenger sales and accounting departments if train Nos. 1 and 2 are discontinued, it is clear that Southern's claimed passenger sales and accounting expenses would be avoidable.

In addition, in light of the fact that the rent for the entire passenger office represents less than one percent of the total expenses claimed for passenger sales and accounting in 1977, protestant's argument that these departments are burdened with higher fixed costs than other departments lacks substance.

Similarly, the testimony of Southern's cost witness established that no expenses associated with excursion trains are included in the expenses claimed by the witness for the passenger sales and accounting departments in 1977. Consequently, protestant's argument that the entire cost of the passenger sales and accounting departments should not be charged to train Nos. 1 and 2 is without merit.

Southern's cost witness noted that the only substantial cost increase resulting from discontinuance of train Nos. 1 and 2 would be the costs of transporting so-called "deadhead" passengers (i.e., those riding on business passes), who now use the trains. For the year 1977, Southern's cost witness established that there were 4,090 such trips between Washington, D.C. and Atlanta, Ga., plus 1,299 intermediate trips. It is the position of the carrier's cost witness that had train Nos. 1 and 2 not been operating, these employees could have used other means of transportation at an estimated total cost of $349,038 for 1977. Table 9, below, is a recap of the computations of this cost witness:

TABLE 9

Estimated Southern employee business travel expenses for other forms of transportation for 1977

Item	Amount
Air Coach fare Washington to Atlanta (4,090 employees x $72.00)	$294,480
Intermediate travel (300 (est.) miles per trip times 1,299 employee trips times 14 cents per mile automobile allowance).	54,558
Total	349,038

Compared with the magnitude of the avoidable losses claimed for 1977, Southern's cost witness concluded that this added cost is insignificant.

The protestant's witness in his written testimony stated that appendix FAL-6 to carrier's exhibit 8 indicates that Southern employees' business travel, using train Nos. 1 and 2, saved the Southern Railroad about $349,038 that would otherwise have been spent for other forms of transportation. However, in calculating the above savings, the witness contended that Southern's cost witness failed to reflect hotel expenses in connection with at least some of this business travel of Southern employees. Assuming that at least half of Southern's employees would have incurred hotel expenses as a result of their travel by other means, and only applying that to the 4,090 employees who traveled between Washington and Atlanta, the witness maintained that approximately $45,000 should be added to applicant's employee business travel expense of $349,038. This witness also argued that this item should be "credited" to the "Southern Crescent" and the claimed deficit reduced accordingly.

NARP's Executive Director, in a similar fashion, argued that Southern's cost witness failed to recognize hotel expenses and also taxi expenses to and from the airport in calculating the travel expenses associated with business employees. Another NARP witness claimed that the $349,038 figure developed by Southern's cost witness should be increased by $59,762 to arrive at a total employee business travel expense of $408,800.

Finally, a protestant witness went a step further and argued that Southern's cost witness omitted additonal costs for lodging, food, rental cars, parking, taxi, and insurance in estimating the employee business travel expense of $349,038. However, unlike the aforementioned two witnesses, the latter witness did not establish through any creditable evidence the monetary impact of these omitted items.

In response to protestant's arguments concerning the inclusion of hotel expenses in connection with business travel, Southern's cost witness acknowledged that some Southern employees prefer to travel a day ahead of schedule. However, the witness noted that most of the employees at Southern travel between Washington and Atlanta and prefer to fly in the morning to conduct business on the same day.

Southern's cost witness asserted that if an employee had to incur hotel expenses, such expense would be necessary whether the employee rode the train or the airplane.

Finally, cognizant of the fact that NARP's executive director stated that one-fourth of the employees would use hotels and another NARP witness stated one-half, Southern's witness opined that as an employee of Southern, it is doubtful that even one percent of Southern employees would use hotels in conducting their business travel.

Irrespective of whether or not Southern employees would use hotels on business trips, it is evident that the Southern Railroad Company incurred some savings as a result of employees using train Nos. 1 and 2 for business travel between Washington and Atlanta.

With respect to hotel expenses, it should be noted that even though business employees currently utilize train Nos. 1 and 2, they still incur hotel expenses at their destination in the same fashion as if these employees had used some other mode of transportation. Thus, the addition of hotel expenses is improper to include in nonrevenue business passenger expenses.

Nonetheless, the $349,038 computed by Southern's cost witness represents only 5 percent of the $6,622,500 avoidable loss claimed for 1977. This demonstrates that these savings would be insignificant.

Protestant's witness maintained that calculating a truly valid measure of avoidable costs is a difficult task involving considerable effort, judgment, and uncertainty. Specifically, this witness noted that "transfer prices" and time allocations complicate the process. When one unit of a company provides services or supplies to another, this witness contended that it is a universal practice to include some of the fixed overhead of the serving unit in the transfer price, i.e., the charge to the receiving unit. According to this witness, it is possible to transfer unavoidable overhead costs onto nominally avoidable cost accounts.

Similarly, the witness contended that actual time allocations fail to represent accurately realizable savings. Further, the witness stated that labor personnel provide service to both freight and passenger operations. Thus, due to the existence of minimum staffing requirements, the witness argued that some actual time charges to train Nos. 1 and 2 are in fact unavoidable. This witness concluded that to compute validly avoidable costs, every account must be adjusted for both effects. However, the witness offered no evidence except opinions to substantiate that avoidable expenses claimed by Southern's cost witness were inaccurate due to transfer prices or time allocations.

This protestant's witness' contention that the avoidable costs claimed by Southern's cost witness were inaccurate due to "transfer prices" is without merit. As stated in the Code of Federal Regulations, Title 49, Part 1201, *Uniform System of Accounts for Railroad Companies*, section 1-10(d):

> The carrier shall record, as the cost of assets or services received from an affiliated supplier, the invoice price (plus any incidental costs related to those transaction) * * *.

Thus, the inclusion of overhead expenses related to a transaction between a serving unit and a receiving unit would be permissible.

With respect to the contention that time allocations fail to accurately represent realizable savings, it was noted by several of the carrier's witnesses that Southern maintains separate service facilities employing separate personnel for freight and passenger operations. Moreover, it was stressed throuhout the entire testimony of Southern's expert cost witness that only those expenses that were identified to be directly avoidable if the proposed discontinuance is granted, were included in exhibit 8. Thus, any expenses associated with employees who handle both freight and passenger operations were excluded from the expenses claimed for train Nos. 1 and 2 in 1977. As a result there are no time allocations involved in the computation of expenses claimed by Southern's cost witness for 1977 for train Nos. 1 and 2.

In addition to providing a comparison of actual revenues and avoidable expenses for the year 1977 attributable to train Nos. 1 and 2, Southern's cost witness also considered various alternatives to the discontinuance of train Nos. 1 and 2, such as limiting service to a particular segment of the line, to weekend, seasonal, holiday, or special-run service. In reviewing the financial data associated with each of these alternatives, this cost witness concluded that there was no basis for adopting any of these alternatives.

With respect to operating over only a segment of the line, the carrier's cost witness noted that Southern's experience with train Nos. 5 and 6, operating between Washington, D.C. and Charlotte, N.C. and train Nos. 7 and 8 between Washington, D.C. and Lynchburg, Va., demonstrate that this is not a feasible alternative. In each case, the operation of these trains resulted in losses to Southern.

In order to demonstrate the financial effects of operating train Nos. 1 and 2 in triweekly, weekend, and holiday service between Washington, D.C. and Atlanta, Ga., Southern's cost witness constructed appendix FAL-5 to exhibit 8, enclosed as appendix D. For all three scenarios, carrier's cost witness noted that operation of train Nos. 1 and 2 resulted in avoidable expenses in excess of revenues. Consequently, Southern's cost witness concluded that there were no practical alternatives to the discontinuance of train Nos. 1 and 2.

Protestants did not question or dispute Southern's development of revenues and expenses associated with the operation of train Nos. 1 and 2 under various operating alternatives.

Southern's development of revenues and avoidable expenses assoiated with triweekly, weekend, holiday operation of train Nos. 1 and 2 utilizing the same methodology employed in developing the revenues and avoidable exepenses claimed for train Nos. 1 and 2 for 1977 is reasonable. Moreover, Southern's calculations of the financial results of operating train Nos. 1 and 2 under these various alternatives appears relatively accurate. Consequently, Southern's computation of the avoidable losses associated with various operating alternatives of train Nos. 1 and 2 can be considered acceptable.

Southern's balance sheet as of December 31, 1977, shows current assets of $391,849,000 and current liabilities of $241,574,000. In addition, Southern's income statement displays net incomes for 1975, 1976, and 1977 of $92,596,000, $92,549,000, and $110,546,000, respectively. Appendix E, enclosed, discloses the net incomes for the "Southern Consolidated System" for 1976 and 1977.

On the basis of the analysis of both Southern's and protestant's evidence, exception has been taken to certain items claimed to be avoidable upon discontinuance of Southern's operation of passenger train Nos. 1 and 2. Southern's avoidable cost showing has been adjusted in appendix C. Specifically, Southern's avoidable costs have been reduced by eliminating the following items of expenses:

1. Locomotive repair expenses of $139,000.
2. Fuel expenses of $173,900.
3. Operation of second section expenses caused by Southern business cars of $14,100 (reflected in the fuel expense account).
4. Washington Terminal Company expenses of $33,000.
5. Richmond, Fredericksburg, and Potomac Railroad block "D" expenses of $52,000.
6. Alexandria Station expenses of $100.
7. Non-revenue business passenger expenses of $349,038.

Both Southern and protestants have claimed certain avoidable expenses which are questionable. However, if all questionable items of expense are disallowed, Southern would still have incurred an avoidable loss of $6,210,400 for the year 1977, based on the restatement. In addition, consideration must be given to expenses, not currently being incurred, that would be incurred for the transportation of company personnel by other means of transportation. This amounts to $349,038, which must be treated as a deduction from avoidable expenses in excess of revenues. The total avoidable loss would then be $5,861,362 ($6,210,400 minus $349,038).

SUMMARY OF PUBLIC EVIDENCE

Summaries have been set forth chronogically to correspond to the cities where evidence was received.

WASHINGTON, D.C.

Support.—In addition to the six company officials and two consultants who testified for Southern at Washington, nine other witnesses supported the discontinuance of train Nos. 1 and 2. One, the Vice President-Research of the American Bus Association, stated that buses were a reasonably adequate substitute for the service of the Southern "Crescent." Another management consultant said that the "Crescent" is wasteful. A third witness, appearing on behalf of the Virginia State Chamber of Commerce, testified that the local chambers in Danville, Lynchburg, Charlottesville, and Alexandria all supported the proposal. Six of

Southern's freight customers also supported the proposed discontinuance. One testified that anything that loses money for Southern loses money for his company.

Three other witnesses, representing commercial airlines, took no position on the proposal but stated that those carriers could easily accommodate many additional travelers along the route of the Southern "Crescent."

Opposition.—The Executive Director of NARP and the Virginia Legislative Director of the United Transportation Union opposed discontinuance. The NARP official, who admitted that if he were Southern's President he would have sought to discontinue the trains as early as 1975, favored a takeover by Amtrak with no interruption of service. The labor spokesman offered train count reports to show the popularity of the train, but alleged no adverse effect of the discontinuance on Southern's employees.

One public witness in opposition at Washington pointed out that since an earlier discontinuance of service by Southern to Alta Vista, Va., he and his wife have not been able to visit relatives as frequently as they had. He believed the "Crescent" should continue as an optional form of travel.

CHARLOTTESVILLE

Support.—Four freight customers of Southern and two local citizens supported the company's proposal. The shippers, engaged primarily in the construction materials industry, pointed out that the passenger train was outmoded as a means of transportation. The two local citizens stated that the deficits could be better spent to pay for 100 miles of welded rail or other purposes.

All four company representatives pointed out that rail freight expenses have become an increasingly larger share of the final cost of their products to the consumer, in some instances reducing their competitive abilities.

Opposition.—Thirteen witnesses favored continuation of the trains. Representatives of the State Corporation Commission, the Albermarle County Board of Supervisors, and the City Council all urged the Commission to ensure that train service, whether performed by Southern or Amtrak, continued without interruption. Other protestants, who included a number of college professors, and the University of Virginia Student Body President generally stated that train Nos. 1 and 2 provided a convenient, safe, energy efficient, and essential mode of transportation, particularly for the handicapped. A member of the National Passenger Train Association stated that Southern has set the standard for train service and, if Amtrak assumes it, there would be a degradation of the service.

A petition was offered into evidence by one witness with the signatures of 136 people protesting the proposed discontinuance and asking the Commission to retain the "Crescent" service. This witness as well as many other opposition witnesses, cited increased pollution from other modes of transportation as a reason for retaining the Southern service.

Other public witnesses spoke of the need for the "Crescent" to transport college students with belongings to universities in the Northeast. Others stressed the inconvenience of the plane schedules out of and into Charlottesville, especially to the District of Columbia, and the discomfort and general inadequacy of bus service. The cultural benefits of train service were also spoken to by a few witnesses.

A witness who was also a stockholder of Southern spoke in opposition. She endorsed continuing the "Crescent" because she believes the Southern owes it as a public service to the community even if it meant lower dividends. The acquisition of a Federal subsidy by Southern also was supported by her.

LYNCHBURG

Support.—Witnesses representing Vaughn Chevrolet and Cadillac, Inc., an automobile dealer, Campbell-Payne, Inc., a lumber and building materials wholesaler, Piedmont Mills, a wheat and a corn miller, and Griffin Pipe Products Co., a tile, iron and case iron pipe producer, appeared to support the Southern's proposal. The witness from Vaughn Chevrolet and Cadillac, a former Mayor and City Councilman of Lynchburg, testified that the "Crescent" should be discontinued because there is no justification for continuing an unprofitable service which is not used by the public. No governmental body should mandate continued service under these circumstances according to the witness who stated he was testifying from personal conviction rather than from any direct benefit he would receive if the trains were continued.

Rail freight service is very important to the other three businesses. Campbell-Payne's representative felt there is little or no need for passenger train transportation in Lynchburg, which contains a number of local and interstate highways and is served by airlines and buses. Piedmont Mills and Griffin Pipe Products Co. representatives both felt that their companies were in effect subsidizing the unused passenger train service through higher freight rates or reduced services. Piedmont's representative also pointed out that rail freight rates are passed on to the consumer and are reflected in the cost of food.

Opposition.—Seven public witnesses from Lynchburg testified in opposition to the termination of the "Crescent" service. One of them, a Southern stockholder stated that the operating deficit cost the stockholders less than one cent per share. He was concerned with the increased energy consumption which discontinuance would cause, and suggested a fare structure which would raise short-haul rail passenger rates and lower long-haul rates so as to be comparable with air fares.

Another witness, a Virginia State Senator presenting only his own views, commented on the Southern's high profits and felt that the "Crescent" losses were not having a detrimental effect on Southern's overall earnings. He and other witnesses suggested the train's use would increase if it were advertised. This witness as well as others represented that the "Crescent" should not be discontinued until Amtrak service replaced it. They fear that once discontinued it will not be picked up later. One witness opined that discontinuance of any segment of mass transportation is a contradiction of the national transportation goal.

Other witnesses pointed out that trains can travel in bad winter weather while planes, buses, and autos are rendered useless. One witness asserted trains are safer than driving and less expensive. A student witness finds the train very convenient for meeting examination schedules and financially affordable. Another witness felt the train schedule precluded some people from using it even though he used the service about 20 times a year.

DANVILLE

Support.—Two witnesses appeared to support the Southern in Danville, one representing Southern Processors, a subsidiary of Universal Leaf Tobacco, Inc., and the other, Whittle Plywood Corp. Both companies rely heavily on rail transportation. Southern Processors shipped or received over 600 rail carloads in 1977. Whittle Plywood received about 65 percent of its wood by rail while about 30 percent of its outbound shipments were by rail.

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Whittle relies on rail service because it is economical. Increased rail freight rates would result in a switch to truck transportation or in higher costs that could be passed on to consumers.

Both companies believe that continued Southern deficits in passenger service will be detrimental to their freight rates and service. Southern Processors feels that such deficits could weaken its competitive position in the tobacco industry because of higher rates combined with less service.

Opposition.—Six witnesses opposed discontinuance. These individuals noted that Southern planned to continue a number of steam excursions, and that bus and airline service paralleled the route of the Southern "Crescent." They believed that this alternate transportation was required.

The Virginia State Senator representing Danville wished the service retained because it affects his constituents. Both he and other witnesses were concerned that should Amtrak assume the Washington to New Orleans route there be no time lag between services. Further, he asked for assurance that Amtrak would not later drop the service.

Other witnesses were particularly concerned that a lack of train service would make Danville a less attractive place for new business and industry to locate and thus have a detrimental economic impact on the city since there is limited air service to Danville. Another witness spoke to the convenience the train affords mothers with small children, students, and the less affluent. While the bus is less expensive, one witness said, it is less comfortable. One witness said that trains provide a good introduction to foreigners visiting the United States.

GREENSBORO

Support.—Officers of four companies involved in the shipment of wood, brick, and automobiles supported Southern's proposal. They were generally of the opinion that a Commission decision requiring continued service would increase inflation. One believed that the "Crescent" has outlived its usefulness. He felt that a healthy rail freight system is essential to the economic well-being of Greensboro and to the Nation. The Southern should be permitted to discontinue its passenger service so that it may concentrate its resources on furnishing shippers better rail freight services. This will allow reduction of the cost of goods and services provided to the vast majority of the population, rather than rail passenger service only to a few.

Opposition.—Eighteen individuals including a State Senator from Greensboro urged the Commission to require continuation of train Nos. 1 and 2. According to these witnesses, the trains were convenient, affordable, energy conserving, and essential to the national defense. The untapped potential of the trains, it was maintained, could be realized through advertising. At the same time, some witnesses stated they could not see saddling a privately operated industry with a losing proposition.

SALISBURY

Support.—Three shipper witnesses and a private individual testified in support of Southern. The freight customers who produce and ship construction materials concurred in the view that discontinuance would on balance benefit Salisbury helping Southern to provide those freight services upon which the economic health of the community depends. The private witness questioned the propriety of requiring Southern to continue a money-losing operation.

Opposition.—A total of 12 individuals argued against discontinuance, citing personal convenience, comfort, and energy savings as primary considerations. One witness pointed out that air service required driving 55 miles each way to the airport. Some said they would use and accept Amtrak grudgingly, while others said they would not use it because of its poor service, especially its tardiness. They agreed the service could not be any better. One witness stated that the losses were tax deductible and could be offset with profits generated on Southern's freight service. One protestant noted, "Everybody comes up here and opposes it and don't ever ride it."

CHARLOTTE

Support.—Testifying in favor of Southern's proposal at the Charlotte hearing were four shipper witnesses and three local citizens. The freight customers, who produce synthetic fibers, steel reinforcing bars, and snack foods, believed that it was unfair and inequitable for freight shippers and receivers to subsidize the passenger deficits. They also stressed that the funds wasted on passenger service could be better spent to maintain and improve freight equipment.

Each of the local citizens who favored discontinuance registered their opposition to any ICC action which would force Southern to continue losing money.

Opposition.—A representative of the North Carolina Department of Transportation recognized that the provision of this service is a strain on the finances of Southern, but opposed discontinuance because it would reduce the transportation options available. In addition he asserted that, since the Washington-Atlanta corridor was one of the Nation's most populous and was growing rapidly, some train service whether provided by Southern or Amtrak, should be preserved.

Thirteen other witnesses opposed Southern's proposed discontinuance of train Nos. 1 and 2. In general, they commended the service provided and felt that more advertising would make the service profitable. The "Crescent" should be preserved as a "mobile national monument" according to one witness. Another suggested that it be used as a training ground for Amtrak employees for the rest of the country. One witness pointed out that at times the "Crescent" is so full it must turn away patrons or add on cars.

SPARTANBURG

Support.—Five businessmen and a college student spoke in favor of discontinuance. The businessmen, freight customers of Southern, stated that other modes of transportation were adequate to serve the public needs for intercity travel and that the public would be better served if the money lost on train Nos. 1 and 2 was instead spent to acquire badly-needed rail freight equipment. The student agreed with these comments, adding that Southern should not be asked to continue losing money just so a small percentage of the public that rides the trains could be served.

Opposition.—Eight witnesses, including three public officials, spoke in favor of a continuation of service. A high school student stated that the trains were convenient, comfortable, energy efficient, and essential transportation of poor and disadvantaged citizens. A State representative acknowledged that the "Crescent" may never be a paying proposition, that he had not taken the train in 15 years, and that his wife was afraid to ride a train, but he contended that the service was vital and could be more effectively promoted. Others stated that the "Crescent" was an "important option" for student travel and had a tremendous potential.

GREENVILLE

Support.—Four witnesses spoke in favor of the discontinuance of the Southern "Crescent" at the Greenville hearing. Three were local businessmen expressed concerns that freight customers would be required to underwrite the train's deficits and that Southern's ability to provide good freight services might be impaired if it were compelled to continue to absorb the losses. A fourth witness, a self-proclaimed "rail buff" who appreciated Southern's steam excursion program and other efforts on behalf of rail fans, believed there are not enough people riding it to make it profitable. There is no need for the railroad to be forced to continue to run it.

Opposition.—Eleven individuals, including four State Legislators and a union official, opposed discontinuance. They stated that train Nos. 1 and 2 were a vital part of the area's transportation system, that Southern was profitable enough to offset the losses, that the trains would be needed in the event of an energy crisis, and that more advertising would create a larger ridership. One public official stated that the people he represents are poor and disadvantaged, and are also entitled to be able to move about the country.

CLEMSON

Support.—No witness appeared at Clemson to support Southern's proposal, although one protestant stated that one cannot ask a business to lose millions of dollars for reasons of sentiment.

Opposition.—Of the 13 witnesses urging continuance of service, 5 of them stated that the provision of equivalent services by Amtrak would be an acceptable substitute. These protestants asserted that the Clemson area needed the alternate means of transportation provided by the trains, since bus service was in their opinion inadequate. A State employee who had traveled on the "Crescent" 56 times in 1977 and 28 times in 1978 added that the benefits of the trains in terms of convenience, economy, and energy savings could be translated into a greater patronage through increased advertising. Another witness stated she needed the train's services for medical reasons. It was further suggested that Southern should increase, not eliminate, its rail passenger services. One witness maintained that the railroads have a continuing obligation to the public to provide passenger and freight service because of the initial benefits they received at their inception, such as rights-of-way, donation of land, and initially low taxes.

TOCCOA

Support.—Of the four witnesses at Toccoa who supported Southern's position, three were officers of local businesses which manufacture heavy earth-moving and mining equipment, distribute liquid petroleum gas, and supply pulpwood to paper products. One of these was also Chairman of the Toccoa-Stevens County Airport Authority. In addition, the Executive Vice President of the Toccoa-Stevens County Chamber of Commerce supported the discontinuance noting that because an under utilized bus service parallels the trains' route through Toccoa, it is unnecessary to have both of these services when one can fill the need with room from future passenger growth.

Opposition.—Sixteen persons stated their opposition to Southern's proposal. A representative of the Georgia Public Service Commission stated that the Commission opposed discontinuance but would deem an Amtrak assumption of the operations acceptable.

Other witnesses said that trains were needed by the elderly and poor and were more convenient and safer than buses. Still others said the "Crescent" was "part of our Southern heritage" and provided excellent service.

The Director of Public Affairs at a local college contended that the passenger reservations system was poor and that more advertising was necessary.

The pastor of a local church also criticized the lack of promotional efforts and asserted that train travel resulted in fuel conservation.

One witness contended that Southern had undertaken a conscious compaign to rid itself of the "Crescent" through reduced advertising. He also claimed that Southern enjoyed a monopoly on rail passenger service in the area and should thus foot the bill in hopes that the "Crescent" might someday become immensely profitable. He added that discontinuance of the trains would endanger the national security.

Another witness believed that profits on freight services were sufficient to offset the passenger train deficits.

The Georgia UTU State legislative director protested the discontinuance of train Nos. 1 and 2 and appeared at two other Georgia hearings in an opposition role. He requested that the Commission impose the New Orleans and Amtrak employee protective conditions in the event of discontinuance rather than the Burlington conditions which he found inadequate.

GAINESVILLE

Support.—Five freight customers of Southern concurred in the view that the mounting passenger train losses imposed an unreasonable and unnecessary burden on the railroad, shippers, and receivers of freight. On cross-examination, these witnesses testified that alternative means of transportation were readily available and that, on the basis of personal observations and Southern's representations, it was clear that the trains were little used by the public.

Opposition.—Nine individuals favored a continuation of the operations of train Nos. 1 and 2. Among other things, they stated that the trains were convenient, promoted balanced growth in the area, were required for the transportation of underprivileged citizens, and would be needed if another energy crisis occurred. In addition, they criticized what they viewed as an apparent lack of advertising, an inadequate reservations system, and unduly high fares.

ATLANTA

Support.—Five individuals supported Southern's proposal at the hearing held in Atlanta. Four were officials of companies who use Southern's freight services, while the fifth represented the 371 members of the Georgia Freight Bureau. The president of a metal distributing and processing concern testified that the use made of these trains appears to be a waste of energy and resources. The way to keep the Southern strong and viable is to permit it to trim the losses it is experiencing on these passenger trains. The spokesman for the Georgia Freight Bureau drew a similar conclusion on the basis of their members' beliefs that it is unfair for the relatively few persons who ride this train to expect shippers to subsidize the "Crescent."

On cross-examination a power equipment manufacturer was asked whether it would make sense for Southern to spend more money on advertising the Southern "Crescent." He responded that the sale of a product which the public does not want is not helped by advertising.

Opposition.—Representatives of the Congressman, the Mayor, and the Office of the Consumer Utility Council for Atlanta all supported the continuance of train service. They contended the trains were energy efficient and were needed as an alternative mode of transportation.

Additional witnesses subscribed to the view that operations should not be discontinued. While these witnesses generally praised the professional way in which "Crescent" was operated, some questioned the accuracy of the avoidable loss claimed by Southern, while others speculated that Southern had not made sufficient efforts to avoid losing money. In addition, many of the witnesses were optimistic about the future of passenger trains. It was contended that the economic feasibility of rail passenger service was improving, that there was a "future need" for train travel which "the U.S. has not discovered yet," and that there was a "feeling that train travel is coming back."

ANNISTON

Support.—The proposal to discontinue the Southern "Crescent" was supported by three local freight customers during the hearing in Anniston. These customers of Southern expressed their concern for the maintenance of transportation costs at competitive levels and generally agreed that it makes no sense to continue unprofitable services when those services are underutilized and there is no prospect that the losses can be eliminated.

Opposition.—Among the seven witnesses opposing discontinuance was an assistant to the Congressional representative, who characterized the "Crescent" as "a fixture we would like to see continued." Also testifying against Southern's proposal was an officer of NARP, who questioned the accuracy of Southern's avoidable loss calculations, and a union official, who asserted that Southern should advertise more frequently.

Four local citizens also registered their objections to Southern's proposal. Some witnesses said that the trains were more convenient than other modes of transportation, while another witness, who had never ridden on the "Crescent," testified that the threat of an energy crisis required continued operations.

BIRMINGHAM

Support.—Supporting Southern's proposal at the Birmingham hearing were representatives of three of Southern's freight customers who felt that the Southern "Crescent" is a superfluous operation. One witness said that Southern is not so profitable that it can afford to dissipate its freight revenues on a nonessential passenger service. We also contended that the Commission should not require the Southern to continue losing money on its passenger trains. Moreover, he believed the Commission should require it to discontinue the "Crescent."

A second witness, representing the supplier of electrical power to much of the Southeast, testified that passenger services should not be a burden on the consumer of electricity by subsidizing those rates through the transportation of coal.

Opposition.—Among the 19 individuals protesting the discontinuance of train Nos. 1 and 2 at Birmingham were the Mayor of Birmingham, a representative of the Alabama Public Service Commission, and an assistant to the senior U.S. Senator. It was their testimony that the trains represented a vital link in the State transportation systems. All three witnesses stated, however, that they would not oppose discontinuance if Amtrak would assume operation of train Nos. 1 and 2.

Of the remaining public witnesses, three were railway union members who had not ridden the trains in years even though they were eligible to obtain a pass but said that the trains could be profitable if they were advertised more. The rest of the witnesses, ranging from a high school student to a retired Southern "Crescent" porter, expressed a number of different views. Several said that the trains would be required in the event of a war or energy crisis, while others stressed the train's convenience and comfort. All agreed, however, that Southern had maintained the train's high standards of service.

LIVINGSTON

Support.—Two shipper witnesses favored the discontinuance of train Nos. 1 and 2. They contended the money wasted by Southern on its passenger train could be used to maintain and improve the freight services that are vital to their companies and other businesses.

Opposition.—Nine witnesses objected to Southern's proposal. One testified that the "Crescent" was his favorite mode of transportation and could be popularized through more extensive advertising. Another witness said that further publicity would remedy the "Crescent's" deficits, that many gimmicks that have not been tried, and that Southern, with its good management, could surely find a way to make a profit on the trains.

MERIDIAN

Support.—Four witnesses in Meridian can reasonably be characterized as supporters of Southern's proposal. First, the Mayor of Meridian said that he had not heard any reasonable protest in opposition to the proposal. He would not ask the Commission to require Southern to continue to operate at a sizeable loss. He further contended the city's ability to attract new business and industry is not dependent on the continuation of the underutilized service.

He did, however, say he would oppose discontinuance if passenger train service is rerouted through Birmingham, Montgomery and Mobile as he heard it might be.

A representative of the Meridian Chamber of Commerce said they understand the reasons for Southern's decision. The Chamber further requested Amtrak to take over the train service as soon as Southern was relieved of its responsibility.

In addition, two freight customers of Southern testified in support of the Company's proposal. If continued, they contended the "Crescent" will only produce further deficits that must be paid for in higher freight rates or reduced services.

Opposition.—A member of the Mississippi Public Service Commission opposed any interruption of service. He argued that Southern should purchase new equipment and undertake innovations such as free meals to increase ridership. In his view, the company could readily offset the passenger train deficits with profits derived from freight services. Nine other opponents of the proposed discontinuance also testified. An attorney suggested that the service was not utilized because of lack of maintenance and publicity. A UTU official expressed a concern regarding employee protection. A Southern "Crescent" conductor said that ridership had increased substantially following Southern's announcement of its intention to discontinue the service.

One witness said that when one is in business it is sometimes necessary to incur some losses. Others spoke of the "Crescent's" convenience, especially for senior citizens, and nostalgia.

LAUREL

Support.—Two freight shippers and the Executive Secretary of the Laurel Chamber of Commerce appeared at the hearing in support of the discontinuance of train Nos. 1 and 2. They contended continuing deficits must be eliminated to permit Southern to operate profitably and efficiently in future years. Similarly, the Chamber of Commerce spokesman said that the Chamber's Board of Directors unanimously agreed that they could not insist that Southern be forced to continue an operation which was showing such a financial loss despite the fact the Southern had provided first class service to attract passengers.

Opposition.—Twelve witnesses took the position that the trains should continue to operate, although four of them said they did not care whether Southern or Amtrak provided the service. The Mayor of Laurel expressed sympathy for Southern's position but stated it was unrealistic to expect every operation to earn a profit. A local banker called the "Crescent" "the only luxury train left in the United States" and concluded that it was essential for the overall transportation needs of local citizens. A rail enthusiast said the "Crescent" was a "superb train" and cited convenience as the major factor warranting its continuation.

Other witnesses saw a need to preserve rail service to accommodate senior citizens and to provide a comfortable and convenient mode of travel.

HATTIESBURG

Support.—The president of a company which produces concrete construction blocks supported Southern's proposal at the hearing held in Hattiesburg. He testified that any governmental action requiring Southern to continue the "Crescent" would constitute a wasteful and inefficient use of corporate assets that must be paid for by customers and the general public through increased taxes or higher prices.

The Mayor of Hattiesburg testified that he had not formed a final opinion regarding the merits of Southern's proposal. He did state, however, that he was not aware of any significant opposition to Southern's proposal, despite the fact that the proposed discontinuance had been publicized on radio, television, and in the newspapers; that the discontinuance would not have any adverse effect on Hattiesburg's ability to attract new business and industry; and that other existing means of transportation were adequate to meet the city's needs.

Opposition.—Six local citizens expressed opposition to Southern's proposal. A retired teacher said that train service had been her perference for many years, although she had not used the "Crescent"

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in the past 3 years. Other witnesses said rail passenger service was important for the life of cities. He felt Amtrak would not be a very good alternative to the "Crescent," but would be "adequate functionally." Another speculated that the "Crescent" would be profitable in a few more years as a result of a return to train travel.

POPLARVILLE

Support.—Two witnesses at Poplarville agreed with Southern that the trains should be discontinued. A paper company representative testified that freight shippers should not be required to subsidize deficit ridden passenger operations and that the Poplarville area had more than adeqate alternative modes of transportation. A fertilizer company representative stated that the deficits which the "Crescent" is generating are inimical to the welfare of the railroad, his company, and the farmers in the area.

Opposition.—A retired farmer said he wanted the "Crescent" continued; he preferred that Amtrak not assume the operations. On the other hand, a UTU representative requested that Amtrak exercise its right to provide the services of train Nos. 1 and 2, if the "Crescent" is discontinued.

NEW ORLEANS

Support.—In addition to the four witnesses who presented Southern's rebuttal evidence, four other individuals testified in support of the Company's proposal at the hearings held in New Orleans. Three were officers of companies whose goods are transported by Southern and believed that elimination of the "Crescent" passenger service losses will reduce the drain on the Southern and enable it to invest in rolling stock for improved freight service. They also contended discontinuance will decrease the need for freight rate increases, and thus, contain increase of prices to the consumer of food and other products.

Opposition.—Nine additional witnesses voiced objections to the proposed discontinuance. Representatives of the local Chamber of Commerce and the Texas Association of Railroad Passengers both supported a takeover of the service of Amtrak if the trains were discontinued. The latter witness commended Southern's service and acknowledged the burdens which the deficits imposed on the carrier. In addition, a representative of NARP questioned the accuracy of the avoidable losses claimed by Southern.

Among the other protestants were a steamboat captain who opined that the excellent service provided by Southern might not be maintained by Amtrak. Another witness found the existing services very convenient. Another asserted that Southern had not dealt in good faith with Amtrak. Others said Southern lost money on the trains because of a lack of promotion.

Also testifying in New Orleans was the Vice President of Marketing for Amtrak. He described Amtrak's present efforts and policies regarding promotion and advertising but took no position on Southern's proposal.

BRIEFS

Briefs were filed by Southern, NARP, Railway Labor Executive Association and the Railway Employees' Department and Sheet Metal Workers' International Association.

In its brief Southern submits that it has conclusively established by evidence of record that the continued operation of train Nos. 1 and 2 would impose an undue burden on interstate commerce. Southern states that its avoidable losses totaling at least $6.6 million in 1977 are the latest in the losses sustained by the company which has absorbed more than $32 million in passenger train deficits since Amtrak came into being in 1971. Given the upward trend of these losses it is clear that inflationary forces and the minimal demand for passenger service will only accent future losses and the attendant burdens.

The avoidable losses sustained were as follows: 1972—$4.4 million; 1973—$5.2 million; 1974—$4.6 million; 1975—$5.6 million; 1976—$6.2 million; 1977—$6.6 million.

Southern concludes that only expenses directly related to the operations involved have been included and that the protestants who have contended that certain cost items have been overstated would by their own calculations be able to trim only $700,000 from the 1977 avoidable losses.

Southern so far as it is aware states that the $6.6 million losses sustained constitutes the greatest deficit ever reported for a single pair of passenger trains in a section 13a(1) case. A requirement that Southern continue the inadequately used service at substantial losses would inevitably serve as an impetus to increased freight rates thus requiring shippers and their customers to subsidize or underwrite Southern's passenger deficit. To the extent that the carrier's funds would be wasted on the unneeded passenger services

Southern maintains, money would be diverted from other services which do serve a public need. The elimination of the avoidable passenger service deficit in 1977 would permit Southern to finance the purchase of 1,160 open-top, 100-ton capacity, hopper cars for coal service; 1,058 covered hoppers for use in grain service; or a lesser number of 50 foot boxcars. If Southern elected to purchase materials instead of capital items, the $6.6 million available cash would provide for the purchase annually of approximately 578,400 cross ties; 19,800 tons of new, 132-pound rail; 39,000 freight car wheels; 2.9 million tons of ballast; or 17.7 million gallons of fuel.

Southern maintains that the funds necessary to maintain passenger service would adversely affect the customers of its freight service as well as for when the freight shipper pays higher rates for freight service, it inevitably results in higher prices that the consumer pays for food, shelter, energy supplies, and other products and services. The prospect of future inflation coupled with the highly labor-intensive nature of rail passenger service, makes it likely that costs will exceed the revenues by an ever widening margin. Southern would require substantial amounts of money to purchase new equipment to modify its facilities to accommodate handicapped individuals to comply with the prospective rules in Ex Parte No. 277, Sub No. 1, *Adequacy of Inner City Passenger Service to Accommodate Handicapped Individuals.*

Nor does the overall profitability of Southern's operation diminish the burden imposed on interstate commerce. Southern maintains that it should not be required to provide a service at a substantial loss when that service offers no prospect of paying its way and when the facts show that there is insufficient public need for the service. Southern cannot reasonably be required to continue these deficit ridden operations on the pretext that national defense or humanitarian considerations would be served.

Measures advocated by the protestants such as increased promotional efforts would not stem the tide. Indeed there is already a broad public awareness of the services offered. "Crescent" is so well known all over the country that it has become a part of the history of the South and an institution. Such alternatives to discontinuance, which are as uncertain as potential mail revenues, are not viable and indeed any potential revenue would have a de minimus impact on the total avoidable losses.

Southern maintains that there are no feasible alternatives to a total discontinuance. Requiring continued operation in whole or in part of the train service, including but not limited to service over a segment of the route, weekend, seasonal, holiday, or special run services, was not supported by any protestant or the evidence. Nor were any alternatives suggested by the Commission's order of March 27, 1978 reached by protestants or public testimony. Southern's previous experience with trains operating over only a portion of the route of the "Crescent" confirms that limiting service in this fashion serves no useful purpose. Operations on a triweekly, weekend, or holiday basis provide no solution to the problems faced by Southern even assuming that triweekly operations were to result in a 20-percent increase in ridership, Southern would sustain a loss of $1.31 for each $1.00 of revenue generated. As for weekend and holiday operations, the avoidable expenses would be almost three times the total revenue and indeed the losses relative to revenue would be even greater than that experienced in 1977. As for the possibility of a mixed passenger-freight service, historically there has been a lack of success in using mixed type trains to meet passenger service standards due to the inability to meet schedules, the lack of passenger terminals for connections, and the added expense of crew wages and locomotive power. Mixed trains degrade the superior service and first class reputation on which the Southern "Crescent's" patronage has been built. Although several witnesses in the hearing suggested that the Federal government should provide Southern with a subsidy, it is not acceptable as there is no provision for subsidization of long-haul passenger service except through Amtrak.

As to public convenience and necessity, Southern argues that the impact of discontinuance of the "Crescent" on the traveling public would be minimal in view of the small number of passengers using the train, the lack of a significant need for this service, the availability of alternate common carrier service offered by air and motor buses, and the availability and extensive use made of private automobile. The number of revenue fares paid for travel over any part of the Southern "Crescent's" route totalled 165,729. The two trains combined had an average per trip of less than 196 passengers traveling any portion of the route and operated at a load factor of only 36.5 percent. Southern maintains that the 5-percent increase in ridership in 1977 was attributable at least in part to diversion of passengers from the discontinued train Nos. 5 and 6 to the Southern "Crescent." The long-term downward trend in patronage of Southern's trains has occurred despite persistent population growth in the areas served. Southern faces the same problem as Amtrak; there are not enough people who want to use the train for intercity travel. These passengers are attracted to air travel which is quicker and more convenient at almost the same price on longer trips as the trains must charge. Buses serve more locations and operate at a lower cost than other means of transportation and automobiles give travelers the control over where and when they go.

Southern distinguishes between the riding public who have a preference for rail travel as opposed to public need for the train as a mode of transportation. More than half of all passengers using the "Crescent" do so simply because they like trains or have a curiosity about train travel. Southern concludes that a privately operated railway should not be compelled to continue an unprofitable entertainment service at its expense.

The regions served by the train have an extensive network of interstate, Federal, and State Highways. For those persons who have used the Southern "Crescent" for a "see-the-train" purpose, Southern plans to continue operating its schedule of steam exercusion trains. It concedes that some inconvenience may result from the discontinuance of the "Crescent" but that the inconvenience would be minimal when it is viewed as an alternative means of transportation.

Business and civic leaders testified that the "Crescent" is not a factor in the industrial and commercial activities of the communities it serves and that the trains do not provide an essential service. Southern maintains that the discontinuance would not adversely affect railway labor. To the extent that any employees remain out of work during the period necessary to place them in comparable jobs, Southern has agreed to afford them the so-called "Burlington" conditions. These conditions insure employees that their earnings will be maintained, that they will receive moving expenses if they need to relocate, and that they will receive any retraining necessary to qualify them for available assignments.

The discontinuance of the trains would create a savings in transportation energy of about 2.3 million gallons of fuel annually or approximately 78 percent of present fuel usage. Operation of train Nos. 1 and 2 achieve 26.8 passenger miles per gallon of fuel consumed while the corresponding passenger miles per gallon achieve by commercial airplanes are 21, by private automobiles 32, and by buses 125.

Southern argues that if the services of the Southern "Crescent" are to be maintained despite the lack of need and the increasing losses which it has suffered, Amtrak is the appropriate agency to provide those services. Southern submits that it is almost exclusively a freight carrier and that Amtrak has been mandated by Congress to provide rail passenger service. Southern further argues that Amtrak may commence the service at any time even if it has not reached agreement with Southern and can thereafter negotiate an agreement or request the Commission to establish appropriate terms and conditions relating to the provisions of that service.

Southern concludes that it has done its best to continue the operation of the "Crescent" for as long as possible and to provide fine passenger service to the public. Factors beyond Southern's control indicate that the "Crescent" no longer provides an essential or economically justifiable service and that it would make no sense to require Southern to continue operating passenger trains which the public does not use and which result in increasing losses to the carrier.

In its brief, NARP maintains that the Southern Crescent case is not a normal section 13(a)(1) proceeding because everyone, perhaps even Southern, expects the "Crescent" to continue and the question is whether Southern or Amtrak will be operating the service. NARP believes that the public interest requires Amtrak to assume operation of the "Crescent." However, it knows that meaningful negotiations can only take place in a calm atmosphere. NARP urges that the proceeding be regarded as the result of Southern and Amtrak's failure to complete a take over agreement. It should be noted, however, that in November 1977 Southern had initiated negotiations with Amtrak for the take over of the "Crescent." An agreement had been negotiated which would have provided that Southern turn over the "Crescent" to Amtrak and pay Amtrak approximately $2.7 million in cash and $4 million in equipment as a "buy in fee." This agreement was rejected by Amtrak's board on the basis of Amtrak's belief that the equipment values were excessive and that the provisions limiting Amtrak's use of Southern's tracks and facilities to only the "Crescent" route was restrictive. Southern did increase its offer to pay Amtrak $6.7 million in cash in lieu of the equipment and again the Amtrak Board tabled consideration of the revised offer because of a Department of Transportation study which study was completed on May 8, 1978. NARP maintains that to permit Southern to discontinue the "Crescent" prior to May 1, 1979, is to ignore the realities of Amtrak's current budget which does not contain funding to cover the "Crescent." Thus NARP states Amtrak is not ready to assume the "Crescent" upon a grant of Southern's petition in this case. NARP urges that the Commission not interpose itself in the Amtrak/Southern take over negotiations. It believes that any favorable action on Southern's request would be detrimental to the public interest because it would strengthen Southern's bargaining power at Amtrak's expense. It is, NARP states, requiring action under pressure for Amtrak to initiate some sort of service and to negotiate with "a gun to its head."

NARP cites as precedent for requiring continuation of the passenger service while subsidy arrangements are negotiated and explored the Commission's denial of South Shore's section 13(a)(1) petition to terminate its deficit Chicago Commuter Service and the required continuation of this service for 10 months to give public authorities time to arrange funding for the service. Finance Docket No. 28322 *Chicago South Shore and South Bend Railroad Discontinuance* (not printed), decided April 7, 1977. NARP contends that it would be unrealistic to allow the discontinuance of the train this summer since restoration at a latter date would become more costly and more difficult. A gap in service would result in irreparable harm to ridership, facilities, and employee attitudes.

NARP further argues that Southern has not met the statutory standard set forth in *Atchison, T. & S. F. Ry. Co. Discontinuance of Trains,* 334 I.C.C. 735, 745 (1969). In the cited case the Commission established a two-part test for evaluating passenger train discontinuance requests. The first of these whether continued operation is required by the public convenience and necessity and the second whether such continued operation will not unduly burden interstate commerce have not been met by Southern in this case. In the first of these two criteria NARP acknowledges that Southern has lost $6.7 million per year and that this is a substantial figure. NARP maintains that it has demonstrated that a substantial use of the train exists, which use is paramount even when the carrier's loss is substantial. In support of this position NARP cites previous section 13(a) precedents involving named trains such as the "San Francisco Chief," "Cascade," "California Zephyr," and "City of San Francisco." Where the train is the last on the route and one of the few trains operating in the region, the Commission has not and should not permit complete discontinuance. As NARP noted in testimony of its principal witness, the loss of the "Crescent" would terminate service to many large cities in a growing area of the country. The public need for trains, NARP maintains, should be measured in ridership not in attendance at hearings. The need, NARP argues, is shown by the 165,729 revenue passengers who rode the "Crescent" in 1977. The "Crescent" ridership in 1977 is up almost 8 percent from 1975. The Atlanta to New Orleans leg is down by 5 percent from 1975 which NARP maintains was caused by the reduction from daily to triweekly service in 1975.

NARP contends that the "public interest" considerations should dictate continuation of the "Crescent" until the Amtrak take over based on the testimony of witnesses that alternate transportation is unsuitable or unavailable and the automobile is not a consideration since it is not public transportation. In addition witnesses have testified of the discomfort or inconvenience of the bus. In addition to the transportation consideration NARP proposes that esthetic consideration should be given equal weight in determining public convenience and necessity as patronage by persons seeking amenable transportation.

In regard to the financial consideration, NARP believes that continuation of the "Crescent" is still warranted because of the general financial health of Southern which had first quarter 1978 revenues of $287,501,000 after tax net income of $28,810,000 and an 11.3-percent return on equity. NARP attributes the losses to ineffective marketing and overstatement of unnecessary costs. Southern's marketing efforts in offering its freight service is not the same marketing effort expended on behalf of the Southern. Through a marketing witness from Amtrak NARP presented testimony that, given proper advertising and marketing, substantial traffic increases are possible and that the cost of advertising is recouped through incremental revenue gains and produces incremental revenues about that.

NARP maintains that Southern has also failed to solicit mail and express traffic. Through its principal witness NARP stated that Southern, if participating in the mail revenues, should be able to increase its revenue by roughly $500,000 a year.

NARP contends that many of the Southern's "Crescent" costs are inflationary or unnecessary. Among these costs which NARP questions are the costs of track maintenance, equipment depreciation, maintenance-of-way, maintenance of equipment (other than passenger), transportation (supervision and overhead), taxes (except payroll), and fixed charges. Because these costs would not be eliminated by the discontinuance NARP believes that they are not entitled to a consideration in this discontinuance case. In respect to the overstatement of the "Crescent's" cost NARP urges that the failure to subtract the cost of the business pass riders, the excessive use of locomotive power, and the allocation to the train of certain labor costs which would not be eliminated upon discontinuance of the train should be considered.

This protestant believes that the carrier seeking to discontinue an unprofitable train must first attempt self-help before seeking such discontinuance, particularly when the train is a national institution. NARP described self-help as taking such forms as governmental assistance, take over of station facilities and employees by the cities, work rule changes, better control of joint facility charges, and soliciting mail traffic. It is NARP's position that Southern has not explored any of these other than the abortive Amtrak negotiations. NARP believes that Southern should have explored with Amtrak the possibility of operating the "Crescent" as a joint venture with both companies sharing the operating costs and responsibilities. Although NARP agrees that there are no State or Federal programs for assistance, Southern with its good public image and political clout could have gotten some favorable treatment. Although NARP concluded that Amtrak take over of the "Crescent" may be the best solution, an outright grant of Southern's request would not give either Amtrak or Southern an incentive to negotiate further in good faith.

Whether or not the continued operation would burden interstate commerce NARP states that a railroad operates by public franchise and should be required to continue operating even an unprofitable portion of its franchise for a reasonable period of time in exchange for enjoying the advantageous portions. To continue the "Crescent" for up to a year would give the parties an opportunity to negotiate and would not, in NARP's opinion, be unreasonable. Despite the $6.7 million loss which NARP conceded, continued operation would not in its opinion burden interstate commerce. In support of its position NARP makes the assumption that the $6.7 million deficit could be cut by $700,000 which would represent $350,000 for the cost of transporting business pass riders and $170,000 representing economics from using fewer locomotives. Net loss for the 9-month period, August 1978 to May 1979, would be $6 million but at Southern's effective 38-percent tax rate these losses would amount to $3,720,000.

In its brief the Railway Labor Executives' Association (RLEA) argues Southern's failure to advertise has increased its deficit. It points to testimony of Southern's advertising manager that the last newspaper or ratio advertisements were in 1976 and then only in the Washington and Atlanta areas. Since then, it claims the Southern's only advertising has been in special interest publications such as the

Passenger Train Journal, and, once, in the Official Passenger Railway Guide. The RLEA believes the Southern could enjoy increased ridership, as has Amtrak, if it increased public awareness of its passenger service. Southern determined to abandon its passenger train service some time ago.

The Southern's passenger service should continue to enable Amtrak to assume its control without severe disruption of service and employment. In its view, the Southern filed this petition to gain leverage in its negotiations with Amtrak. The RLEA believes Amtrak may resume the service under section 404(a) of the Rail Passenger Service Act if this discontinuance is granted. The question presented is when the transaction will take place and how severe the interim impact will have been on railway employees and the public. RLEA reasons that discontinuance will be more costly and cumbersome than a continuation until arrangements with Amtrak are completed. So long as Amtrak's takeover is imminent, public convenience and necessity do not permit discontinuance during the interim.

Finally, RLEA argues that section 405(a) of the Rail Passenger Service Act requires the Southern to provide a fair and equitable arrangement to protect employees if discontinuance of intercity rail passenger service is permitted. The southern has minimized the impact which the proposed discontinuance of the Crescent will have on its employees. The Southern has not and cannot say that all employees will continue to be employed. Each employee presently in passenger service with a counterpart in freight service who is not severed will be required to exercise seniority. This will have a domino effect down the seniority list. This will cause displacement of employees and the termination of the least senior employees. Those employees who have spent their entire career in Southern's passenger service as stewards and sleeping car porters, for example, will have no positions available to them upon which to exercise their seniority. Since Southern has asserted, based on experience that most disruption of employment will last approximately 13 months and assuming that few if any employees will be adversely affected by the discontinuance as Southern claims, RLEA asserts there should be no reason for Southern to object to any fair and equitable employee protection formula.

RLEA states that the Southern implicitly recognizes its responsibility under section 405(a) of the Rail Passenger Service Act. The Burlington conditions, *Chicago, B. & Q. R. Co. Abandonment* 257 I.C.C. 700 (1944), the protective formula which the Southern is willing to provide, are wholly inadequate, because they merely grant 4 years of protection, have no provision for priority of employment, or the retraining of employees that the Southern claims to be willing to provide. RLEA says the Burlington conditions fall far below the appendix C-1 minimum levels of protection promulgated by the Department of Labor and certified by the Secretary of Labor as fair and equitable on April 16, 1971, pursuant to section 405 of the Rail Passenger Service Act. RLEA submits that the levels of protection now required by sections 1a(4) and 5(2)(f) of the Interstate Commerce Act are those levels of protection mandated by section 405. The Commission has concluded that it lacked authority under section 13a(1) to impose protective labor conditions. Congress required in section 405(a) of the Rail Passenger Service Act that in the event of discontinuance: "A railroad shall provide fair and equitable arrangements to protect the interests of employees affected by a discontinuance ***" RLEA submits that section 13a of the Interstate Commerce Act and section 405(a) of the Rail Passenger Service Act must be read together and that the Commission must, if it permits a discontinuance, assure that the Southern has complied with section 405 and has provided a fair and equitable arrangement to protect the affected employees. RLEA further maintains that section 405(a) requires, as a condition precedent to any discontinuance under section 13a, that the railroad provide a fair and equitable arrangement to employees. RLEA submits that the Commission must disapprove any train discontinuance under section 13a(1) when it appears that the railroad has not complied with the mandatory requirements of section 405(a).

The Commission must assure that the railroad has complied with the mandatory requirement of section 405(a) of the Rail Passenger Service Act in a discontinuance proceeding. RLEA asserts the Southern has not complied, and, therefore, the Commission must disapprove the discontinuance.

The Railway Employees' Department (RED) and Sheet Metal Workers' International Association (SMWIA) in their brief contend that the issue in this proceeding is whether the discontinuance of the traditional passenger service provided by the Southern "Crescent" is in furtherance of the public convenience and necessity. The applicable test is whether the public need will permit discontinuance and whether preserving the operation will impose an undue and unjust burden on interstate commerce. They maintain that the public need for rail passenger service is well documented in the Rail Passenger Service Act of 1970 (45 U.S.C. 501, *et seq.*) the Commission's "Report to the President and the Congress, Effectiveness of the Rail Passenger Service Act of 1970," (March 15, 1978) and the Harris poll of March 1968 titled "The Continuing Public Mandate to improved Inter-City Rail Passenger Travel."

The record, it is said demonstrates the need to maintain operation of the Southern "Crescent." RED and SMWIA contend there has been a noticeable increase in ridership from 1976 to 1977, up from 140,171 to 148,100. Further, the public interest in the Crescent outweighs the asserted burden on the carrier and interstate commerce and the railroad overall revenues and prosperity must be considered. Assertedly, the Southern's negative financial figures while appearing serious, are not having any appreciable affect on its economic well-being. RED and SMWIA assert that the Southern added three direct expenses to its documentation concerning the "Financial Results of Operating Passenger Trains 1 and 2" totaling $953,000 for 1977 which are not reflected in the accounting of revenues and expenses for 1975 and 1976. They conclude that when the carrier's predictions of economic gloom are considered in light of its acknowledged financial prosperity, and measured against the public's and the employees' need for continuing service, the discontinuance should be denied.

The Southern has indicated it will protect its employees by applying the Burlington conditions "subject to the additional 5 points enumerated in Section 405(b) of the National Rail Passenger Service Act." However, RED and SMWIA contend the carrier is unwilling to provide the employees with the level of protection contemplated by 45 U.S.C. 565 which states that the employee protective arrangements "shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)f of the act." Therefore, they conclude the appropriate level of employee protection must minimally contain the full range of provisions under section 5(2)(f) and section 405 of the Rail Passenger Service Act because section 405(a) of the Rail Passenger Service Act requires, as a condition precedent to discontinuance of rail passenger service under section 13a, that the railroad provide a fair and equitable arrangement to protect its affected employees, the Commission must disapprove any discontinuance under section 13a when it appears that the railroad has not complied with section 405(a). They also point out that section 405(a) of the Rail Passenger Service Act ties in with section 404(a) specifically imposing an obligation in the railroad to provide a fair and equitable protective arrangement in discontinuances occuring after "January 1, 1975."

They allege that the Southern has not complied with section 405(a) of the Rail Passenger Service Act and that the Commission must reject the Southern's request. Alternatively, disapproval may be made conditional upon the requirement of complying with section 405 of the Rail Passenger Service Act.

DISCUSSION AND CONCLUSIONS

This Commission has consistently held that section 13a(1) creates a two-part test for evaluating passenger train discontinuance requests. Specifically, it must make separate findings on (1) whether continued operation is required by the public convenience and necessity and (2) whether such continued operation will not unduly burden interstate commerce. In order to make this determination, the Commission weighs a number of factors, no one of which is deemed to be controlling. In *Atchison, T. & S. F. Ry. Co., Discontinuance of Trains,* 334 I.C.C. 735, 745 (1969), the Commission stated:

> The fundamental question for resolution in proceedings under section 13a(1), such as in this investigation, is "*** what effect the discontinuance of the specific train or service in question will have upon the public convenience and necessity and upon interstate operations or commerce." *Southern R. Co.* v. *North Carolina,* 376 U.S. 93, 104 (1964). Among the factors this Commission considers in making such a determination are the population of the territory serviced, the use by the public of the service sought to be discontinued, other available transportation in the area, the general financial condition of the carrier involved, and the losses it suffers in providing the service. No one factor is, standing alone, dispositive. Thus, the fact that these trains are operating at a deficit is significant. By the same token, public use of, and reliance upon, this rail service, is also an important consideration. *Missouri Pac. R. Co., Discontinuance of Pdssenger Trains,* 320 I.C.C. 1. The short of the matter is: we must balance public convenience and necessity against undue burden on interstate commerce. Cf. *Southern Pac. Co., Discontinuance of Trains,* 334 I.C.C. 159, and *Colorado* v. *United States,* 271 U.S. 153 (1926).

Southern's deficits from the operation of the "Crescent" between Washington and New Orleans are substantial and growing. Expressed in terms of 1977 avoidable expenses in excess of revenues if the trains are discontinued, as discussed previously, these amount to $6,210,400. When consideration is given to the additional cost incurred for the transportation of company personnel, the net savings would be $5,861,362. (Appendix C.)

Southern System Consolidated annual statement (R-1 report) for 1977 filed with the Commission for class I railroads, as stated in appendix E, shows that Southern and its consolidated subsidiaries paid $44,093,000 in Federal and State income taxes on a pretax net of $151,183,000. Thus, its effective tax rate was 29.2 percent. Deducting a tax at that rate would reduce the net savable amount to $4,149,844. This figure is understated to the extent that Southern's crew wages and payroll taxes and vacation expense have been understated, as explained in appendix C.

Where there is no longer sufficient public need to justify such losses, the carrier's overall financial ability to support an unneeded and losing operation is of no particular moment. *Chicago, B. & Q. R. Co., Discontinuance of Trains*, 336 I.C.C. 536, 544 (1970).

In *Southern Ry. Co.—Discontinuance of Trains*, 348 I.C.C. 716, 741 (1976) the Commission stated that Southern's financial health was insufficient reason to require it to continue to absorb the substantial losses associated with the operation of the "Piedmont." The Commission, however, noted that there was no overriding public need for that train because inconvenienced passengers would still have service available on the "Southern Crescent."

Southern now proposes to discontinue the last passenger trains on the route and one of the few still operating in the South. The trains are a vital link between Amtrak's service in the northeast and the transcontinental service connection at New Orleans. Over 165,000 revenue passengers rode the train in 1977 and the ridership on the Washington to Atlanta leg has been growing since 1975. This ridership demonstrates a public need for service. A need for service might justify its continuation, even if at substantial loss to the carrier. This is particularly true when it involves the last passenger train in the area, as is the case here. See *Norfolk and W. Ry. Co. Discontinuance of Trains*, 334 I.C.C. 1, 20 (1968); *Atchison T. & S. F. Ry. Co. Discontinuance of Trains*, 336 I.C.C. 637, 657 (1970); *Southern Pac. Co. Discontinuance of Trains*, 333 I.C.C. 525, 556 (1968).

Here we not only have the last passgener trains on the route but the last passengers trains of their kind operated by a privately owned carrier. While Southern should not be expected to sustain the losses involved here indefinitely, the special circumstances of the case require continued operation for 1 year. Considering Southern's financial health, continued operation for this period should not unduly burden interstate commerce.

It is generally expected that Amtrak will eventually take over operation of these trains. The Department of Transportation's preliminary reexamination of Amtrak's routes proposes this. The final DOT report is not due, however, until December 31, 1978, and then Congress must approve the final plan. Amtrak will not start operating its revised system until some time in 1979.

We believe that in these circumstances Southern should be required to continue operating these trains pending a transfer to Amtrak for 1 year to ensure that there will be no gap in service. If service is disrupted restoration by Amtrak would be more difficult and more costly. Of course, it is possible for the parties to negotiate an agreement during this period and Amtrak could initiate service under section 404(a) of the Rail Passenger Service Act, if service were discontinued. The Commission cannot require a takeover, however, and it is highly unlikely that an agreement will be negotiated pending the Amtrak restructuring.

In F.D. No. 28322, ***Chicago, South Shore & South Bend Railway Discontinuance*** (not printed), decided April 7, 1977, the Commission required continued operation to give public authorities time to arrange public funding for the service. We believe similar action is warranted here. The 1-year period should serve the stated purpose of preventing a gap in service. If a transfer to Amtrak is effected during this time, Southern, of coure, would be relieved of its obligation.

Labor union representatives have requested the imposition of certain protective labor conditions.

In this connection, it may be noted that the Commission is without authority to impose conditions for the protection of employees in train discontinuance proceedings. ***Great Northern Ry. Co., Discontinuance of Service***, 307 I.C.C. 59; ***Missouri Pac. R. Co., Discontinuance of Passenger Service***, 312 I.C.C. 105; ***Soo Line R. Co. Discontinuance of Trains***, 328 I.C.C. 610; ***Southern Changes in Train Service, supra***; and ***Southern R. Co., Discontinuance of Trains, supra.***[9]

Accordingly, Southern will operate the "Crescent" under its present published schedule contained in appendix A for 1 year from the service date of this order.

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[9] Under provisions of section 405 of the Rail Passenger Service Act (45 U.S.C., section 565), a railroad is required to provide fair and equitable arrangements to protect the interests of employees affected by this discontinuance.

Contentions of the parties as to facts or law not specifically discussed herein have been given consideration and found to be without material significance or not justified.

FINDINGS

We find that continued daily operations of train Nos. 1 and 2 by the Southern Railroad Company and its wholly owned subsidiary The Alabama Great Southern Railroad Company between Washington, D.C., and New Orleans, La., is required by the public convenience and necessity, and continued operation for a period of 1 year will not unduly burden interstate commerce. This decision is not a major Federal action affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered:

1. Pursuant to section 13a(1) of the Interstate Commerce Act, Southern Railway Company and The Alabama Great Southern Railroad Company shall continue to operate their train Nos. 1 and 2 between Washington, D.C., and New Orleans, La., for a period of 1 year from the date this decision is served.
2. The investigation in these proceedings is discontinued.
3. This decision shall be effective on the date it is served.

By the Commission, Commissioners Murphy, Stafford, and Gresham dissenting in part.

COMMISSIONER MURPHY, dissenting in part:

I do not believe that the Southern Railway should be required to continue this passenger service for a full year. The record clearly indicates the extent of losses incurred by Southern in conducting this service. Southern should not be required to be subjected to these losses for any longer period of time than is absolutely necessary. Therefore, I would require Southern to continue this operation only until the end of this year.

COMMISSIONER STAFFORD, dissenting in part:

I would require continued operation of the "Southern Crescent" only until the end of 1978. The fact that this is the last such passenger train does not justify a finding of public need for the service. Southern Railway is experiencing significant losses, and should not be forced to jeopardize its financial stability any longer than necessary.

COMMISSIONER GRESHAM, dissenting in part:

I am in agreement with the majority that the Southern should be permitted to discontinue the "Southern Crescent." However, I can find no good reason to require service for another year. Administrative Law Judge Hoyt recommends that service discontinuance be permitted after December 31, 1978. That recommendation is reasonable.

Based upon past experience, it seems likely that the Southern will lose approximately $4 million as a result of the required operations during 1979. Those monies will come from the Southern's stockholders and freight shippers. They might well ask the majority to do a better job of identifying and quantifying the benefits that justify their loss. Requiring those stockholders and shippers to subsidize this service is quite different, it seems to me, from the subsidization of Amtrak with public tax dollars.

I am distressed by the majority's seeming unconcern about forcing a private business to expend considerable resources providing a service that the public has shown it does not want. The majority states: "Considering Southern's financial health, continued operation for this period should not unduly burden interstate commerce." Presumably, the majority would be more concerned and less apt to require a service in 1979 if the Southern was financially unhealthy. Such reasoning, in effect, allows the greatest management freedom to the least efficient managers. It should be clear by now that public policy decisions that disregard incentives for sound management are what help produce bankrupt railroads.

APPENDIX A

Timetable of present operation of Southern Railway System passenger trains Nos. 1 and 2, "The Southern Crescent," between Washington, DC, and New Orleans, LA

Miles from Washington	Read down Train No. 1 daily	Stations Standard Time	Read up Train No. 2 daily
	p.m.		*a.m.*
0	d 7:20	Lv---Washington, DC (ET)---Ar	d 8:30
8	7:37	---Alexandria, VA---	7:50
67	8:41	---Culpeper, VA---	c
112	9:35	---Charlottesville, VA (U)---	6:00
165	10:40	Ar---Monroe (Sweet Briar)---Lv	5:00
165	10:45	Lv---Monroe (College), VA---Ar	4:55
173	10:54	Ar---Lynchburg (Kemper), VA---Lv	4:45
173	11:01	Lv---Lynchburg St. Sta., VA---Ar	4:45
	a.m.		
236	12:10	Ar---Danville, VA---Lv	3:30
236	12:20	Lv---Danville, VA---Ar	3:21
284	1:15	Ar---Greensboro, NC---Lv	2:30
284	1:25	Lv---Greensboro, NC---Ar	2:30
299	f 1:43	---High Point, NC---	f 1:55
334	2:25	Ar---Salisbury, NC---Lv	1:15
334	2:30	Lv---Salisbury, NC---Ar	1:12
375	3:15	Ar---Charlotte, NC---Lv	12:27
375	3:22	Lv---Charlotte, NC---Ar	12:22
			p.m.
399	f 3:51	---Gastonia, NC---	f 11:57
453	4:53	---Spartanburg, SC---	11:00
484	5:35	Ar---Greenville, SC---Lv	10:25
484	5:45	Lv---Greenville, SC---Ar	10:20
514	f 6:20	---Clemson, SC---	f 9:37
547	b 6:56	---Toccoa, GA---	f 9:05
585	7:43	---Gainesville, GA---	8:25
633	d 8:40	Ar---Atlanta (Peachtree Sta.), GA (ET)---Lv	d 7:30

See footnotes at end of table.

Timetable of present operation of Southern Railway System passenger trains Nos. 1 and 2, "The Southern Crescent," between Washington, DC, and New Orleans, LA—Continued

Miles from Washington	Read down Train No. 1 daily	Stations Standard Time	Read up Train No. 2 daily
	Su-Tu-Th	*Triweekly*	*Mo-We-Fr*
	a.m.		*p.m.*
633	8:55	Lv---Atlanta, GA (ET)---Ar	7:10
735	10:18	---Anniston, AL (CT)---	3:41
799	11:55	Ar---Birmingham, AL---Lv	2:10
	p.m.		
799	12:10	Lv---Birmingham, AL---Ar	1:55
854	1:21	---Tuscaloosa, AL---	12:22
889	e 1:55	---Eutaw, AL---	e 11:48
915	e 2:20	---Livingston, AL---	e 11:23
951	3:15	Ar---Meridian, MS---Lv	10:50
951	3:20	Lv---Meridian, MS---Ar	10:45
1008	f 4:28	---Laurel, MS---	f 9:35
1037	f 5:05	---Hattiesburg, MS---	f 9:03
1053	a 5:22	---Purvis, MS---	a 8:44
1076	a 5:49	---Poplarville, MS---	a 8:21
1119	f 6:34	---Slidell, LA---	f 7:37
1154	7:50	Ar---New Orleans, LA (CT)---Lv	6:45

a—Stops on signal to receive and discharge revenue passengers for or from Meridian or New Orleans and beyond.

b—Stops on signal to receive or discharge revenue passengers for or from Birmingham or Charlottesville and beyond.

c—Stops to discharge revenue passengers from Charlottesville and beyond.

d—Daily.

e—Stops on signal to receive and discharge revenue passengers for or from Birmingham or New Orleans and beyond.

f—Stops on signal to receive and discharge revenue passengers.

CT—Central Time.

ET—Eastern Time.

(U)—Union Station.

Mo-We-Fr—Monday, Wednesday, and Friday.

Su-Tu-Th—Sunday, Tuesday, and Thursday.

Source: Southern Railway System Passenger Timetable, January 8, 1978 (Form LT No. 102).

APPENDIX B

Financial results of operating passenger trains Nos. 1 and 2 between Washington, D.C. and New Orleans, La.

YEAR 1977

	Washington Atlanta	Atlanta New Orleans	Total
Revenues:			
Passenger	$4,380,700	$1,085,100	$5,465,800
Other	7,200	----------------	7,200
Total revenues	4,387,900	1,085,100	5,473,000
Avoidable expenses:			
Crew wages	1,350,100	455,300	1,805,400
Payroll taxes and vacation	426,300	143,700	570,000
Meals and lodging	35,200	35,400	70,600
Servicing locomotives	45,500	15,700	61,200
Locomotives repair	545,700	187,800	733,500
Train supplies and expenses	400,600	112,400	513,000
Passenger car repairs	3,172,400	793,100	3,965,500
Fuel	850,700	250,700	1,101,400
Washington Terminal	497,400	----------------	497,400
Alexandria Station	31,700	----------------	31,700
Block "D" track (Potomac Yard)	52,000	----------------	52,000
Station expenses	612,200	157,300	769,500
New Orleans Union Passenger Terminal	----------------	273,200	273,200
Dining car net loss	474,900	222,800	697,700
Switching—Atlanta, Ga	138,900	57,300	196,200
Passenger sales	462,000	114,400	576,400
Passenger accounting	144,900	35,900	180,800
Total avoidable expenses	9,240,500	2,855,000	12,095,500
Avoidable expenses in excess of revenues	4,852,600	1,769,900	6,622,500
Total revenue passengers handled	148,100	45,198	165,729

See note at end of table.

Financial results of operating passenger trains Nos. 1 and 2 between Washington, D.C. and New Orleans, La.—Continued

YEAR 1976

	Washington Atlanta	Atlanta New Orleans	Total
Revenues:			
Passenger	$3,947,600	$974,400	$4,922,000
Other	11,800	----------------	11,800
Total revenues	3,959,400	974,400	4,933,800
Avoidable expenses:			
Crew wages	1,231,000	416,800	1,647,800
Payroll taxes and vacation	385,000	130,300	515,300
Meals and lodging	35,200	34,700	69,900
Servicing locomotives	18,300	6,400	24,700
Locomotives repair	733,700	253,600	987,300
Train supplies and expenses	420,200	117,500	537,700
Passenger car repairs	2,614,400	674,100	3,288,500
Fuel	758,000	224,500	982,500
Switching—Atlanta, Ga	128,800	53,400	182,200
Washington Terminal	430,800	----------------	430,800
Alexandria Station	53,200	----------------	53,200
Block "D" track (Potomac Yard)	42,200	----------------	42,200
Station expenses	167,300	136,200	303,500
New Orleans Union Passenger Terminal	----------------	229,400	229,400
Dining car net loss	436,800	108,500	545,300
Total avoidable expenses	7,454,900	2,385,400	9,840,300
Avoidable expenses in excess of revenues	3,495,500	1,411,000	4,906,500
Total revenue passengers handled	140,171	44,093	157,493

See note at end of table.

Financial results of operating passenger trains Nos. 1 and 2 between Washington, D.C. and New Orleans, La.—Continued

YEAR 1975

	Washington Atlanta	Atlanta New Orleans	Total
Revenues:			
Passenger	$3,771,900	$949,000	$4,720,900
Other	10,300	---------------	10,300
Total revenues	3,782,200	949,000	4,731,200
Avoidable expenses:			
Crew wages	1,108,500	425,100	1,533,600
Payroll taxes and vacation	341,500	130,700	472,200
Meals and lodging	34,300	35,800	70,100
Servicing locomotives	17,300	6,500	23,800
Locomotives repair	586,000	220,800	806,800
Train supplies and expenses	398,500	130,900	529,400
Passenger car repairs	1,976,600	612,600	2,589,200
Fuel	699,600	238,800	938,400
Switching—Atlanta, Ga	70,000	29,000	99,000
Washington Terminal	364,000	---------------	364,000
Alexandria Station	70,800	---------------	70,800
Block "D" track (Potomac Yard)	40,600	---------------	40,600
Station expenses	139,200	121,900	261,100
New Orleans Union Passenger Terminal	---------------	191,200	191,200
Dining car net loss	397,900	95,800	493,700
Total avoidable expenses	6,244,800	2,239,100	8,483,900
Avoidable expenses in excess of revenues	2,462,600	1,290,100	3,752,700
Total revenue passengers handled	137,656	47,519	156,574

Items of expense not included

Maintenance of way—Tracks and structures.
Do—Supervision-depreciation-retirements.
Maintenance of equipment—Supervision-depreciation-retirements.
All traffic expenses.
Transportation-supervision-train—Dispatching and numerous overhead accounts.
All taxes except payroll.
All fixed charges, i.e., bond interest, et cetera.

APPENDIX C

Restatement of revenues to be lost and expenses to be saved by discontinuing operation of passenger train Nos. 1 and 2 between Washington, D.C., and New Orleans, La.

YEAR 1977

	Amount
Revenues:	
Passenger	**$5,465,800**
Other	**7,200**
Total revenues	**5,473,000**
Avoidable expenes:	
Crew wages	**[1]1,805,400**
Payroll taxes and vacation	**[1]570,000**
Meals and lodging	**70,600**
Servicing locomotives	**[2]61,200**
Locomotive repair	**594,500**
Train supplies and expenses	**513,000**
Passenger car repairs	**3,965,500**
Fuel	**913,400**
Washington terminal	**464,400**
Alexandria Station	**31,600**
Block "D" track (Potomac Yard)	--------
Station expenses	**769,500**
New Orleans Union Passenger Terminal	**273,200**
Dining car net loss	**697,700**
Switching—Atlanta, Ga	**196,200**
Passenger sales	**576,400**
Passenger accounting	**180,800**
Total avoidable expenses	**11,683,400**
Non-revenue business passenger expenses	**349,038**
Avoidable expenses in excess of revenues	**5,861,362**

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[1] Understated to the extent that these expenses only reflect minimum contract wages with no provision for overtime pay.

[2] Understated to the extent that these expenses only account for amounts billed by the Washington Terminal Company and the New Orleans Passenger Terminal.

APPENDIX D

Estimated financial results of operating passenger trains Nos. 1 and 2 between Washington, D.C. and New Orleans, La.

	Triweekly (per week)	Weekend (per week)	Holiday (per holiday)
Revenues:			
Passenger	$74,100	$49,400	$56,700
Total revenues	74,100	49,400	56,700
Avoidable expenses:			
Crew wages	22,400	19,600	19,600
Payroll taxes and vacation	7,100	6,200	6,200
Meals and lodging	900	600	600
Servicing locomotives	800	600	600
Locomotive repairs	12,700	11,300	15,300
Train supplies and expenses	5,900	3,700	3,700
Passenger car repairs	67,000	61,000	82,600
Fuel	12,000	8,000	8,000
Washington terminal	3,900	2,600	2,600
Alexandria station	200	200	200
Block "D" track (Potomac Yard)	400	300	300
Station expenses	10,300	5,500	5,500
New Orleans Union Passenger Terminal	5,300	3,500	3,500
Dining Car net loss	6,000	4,000	4,000
Switching—Atlanta, Ga	4,600	3,100	3,100
Passenger sales	9,400	6,900	4,600
Passenger accounting	2,400	1,700	1,000
Total avoidable expenses	171,300	138,800	161,400
Avoidable expenses in excess of revenues	97,200	89,400	104,700
Total revenue passengers handled	2,052	1,368	1,532

Note:

Triweekly assumes 3 round trips per week.
Weekend assumes 2 round trips per week.
Holiday assumes 2 round trips per month.

APPENDIX E

Statement of income Southern Railway Company and consolidated subsidiaries

	Year 1977	Year 1976
	Thousands	
Railway operating revenues:		
Freight	$1,109,447	$1,002,186
Other	30,571	25,806
	1,140,018	1,027,992
Other income	23,850	24,793
Total income	1,163,868	1,052,785
Railway operating expenses:		
Maintenance of way and structures	200,876	175,185
Maintenance of equipment	192,928	177,977
Transportation	362,383	325,997
Other	73,203	66,504
	829,390	745,663
State and local taxes, principally property	26,227	24,965
Payroll taxes	62,592	55,712
Net freight car rent (income) based on time and mileage	(16,672)	(14,817)
Other equipment and rent expense	47,056	40,314
Joint facility rent expense	1,187	1,012
Miscellaneous deductions from income	6,981	7,373
Fixed charges, principally interest	60,924	54,383
Total expenses	1,017,685	914,605
Income before income taxes	151,183	138,180
Federal and State income taxes:		
Current	20,227	25,754
Deferred	23,866	23,185
Total income taxes	44,093	48,939
Net consolidated income for the year	107,090	89,241
Per average share of common stock outstanding	7.04	5.85

FINANCE DOCKET NO. 26482[1]

AUTO-TRAIN CORP., OPERATION RAIL PASSENGER AND AUTOMOBILE TRANSPORT SERVICE, BETWEEN ALEXANDRIA, VA., AND SANFORD, FLA.

Decided September 28, 1977

Public convenience and necessity found to require operations by Auto-Train, transporting automobiles unaccompanied by their drivers, pursuant to a joint booking arrangement for the subsantially simultaneous transportation of an automobile by Auto-Train and of its owner or driver by an airline; and Auto-Train's certificates modified accordingly.

Edward K. Wheeler **and** ***Robert G. Seaks*** **for applicants.**
Larsh B. Mewhinney **and** ***Jeffrey R. Cohn*** **for protestants.**

REPORT OF THE COMMISSION ON FURTHER CONSIDERATION

DIVISION 3, ACTING AS AN APPELLATE DIVISION, COMMISSIONERS BROWN, MACFARLAND AND CHRISTIAN

BY DIVISION 3:

By report and order dated April 23, 1971, in Finance Docket Nos. 26482 and 26483, *Auto-Train, Rail Pass. and Auto Transport Serv.*, 342 I.C.C. 533 (1971), division 3 authorized Auto-Train Corporation (Auto-Train), to provide a combined rail passenger-automobile transport service between Alexandria, Va., and Sanford, Fla. By the same report and order, division 3, authorized Seaboard Coast Line Railroad Company (SCL), and the Richmond, Fredericksburg and Potomac Railroad Company (R.F.&P.), to operate the properties of Auto-Train pursuant to an operating agreement. Service began between Alexandria, Va., and Sanford, Fla., in December 1971. This service has been offered continuously since that time.

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[1] This report also embraces Finance Docket No. 26483, Seaboard Coast Line Railroad Company, Richmond, Fredericksburg and Potomac Railroad Company—Operating Agreement—Auto-Train Corp., Finance Docket No. 27508, Auto-Train Corp., Operation Rail Passenger and Automobile Transport Service Between Louisville, Ky., and Sanford, Fla., and Finance Docket No. 27525, Auto-Train Corp., Seaboard Coast Line Railroad Company—Operating Agreement—Louisville and Nashville Railroad Company.

By report and order dated March 11, 1974, in Finance Docket Nos. 27508 and 27525, *Auto-Train Corp., Louisville & Sanford,* 347 I.C.C. 261 (1974), division 3 authorized a similar service between Louisville, Ky., and Sanford, Fla., with SCL and the Louisville and Nashville Railroad Company (L&N), being authorized to operate the properties of Auto-Train pursuant to an operating agreement. Service between Louisville and Sanford began in May 1974.

Under its certificates, Auto-Train may presently carry an automobile only if its owner or driver is a passenger on the same train. On June 16, 1977, Auto-Train filed a petition for modification of its certificates, which, if granted, would permit Auto-Train to transport automobiles unaccompanied by their drivers, but only pursuant to a joint booking for the substantially simultaneous transportation of an automobile by Auto-Train and of its owner or driver by an airline. On August 19, 1977, Auto-Train entered into an agreement with Eastern Airlines (Eastern), by which the two would cooperate on the provision of the proposed airline-rail, passenger-automobile service, if Auto-Train's petition is granted and appropriate Commission authorization is obtained. Auto-Train has also entered into an agreement dated June 6, 1977, with SCL and R.F.&P. to amend the operating agreement between the carriers to permit the service anticipated by the instant petition.

Auto-Train's petition has been opposed by Autolog Corporation (Autolog), and by Aaacon Auto Transport, Inc. (Aaacon). By order of the Commission, Commissioner Brown, served August 10, 1977, the proceeding was set for disposition under the modified procedure.

MOTION TO DISPENSE WITH INITIAL DECISION

On August 22, 1977, Auto-Train filed a motion to dispense with an initial decision, asking the Commission to issue instead a final report and order. In support of this motion, Auto-Train states that the purpose of an initial decision is to focus on issues and to delineate the scope of the controversy. Auto-Train argues that there is no need here for this process since its application is simple and the issues are clear. Auto-Train argues further that any unnecessary delay would be detrimental to its operations since the fall southbound movement of people gives rise to the round trip reservations which would provide a large part of Auto-Train's business for the next year. If travelers to Florida are unable to make arrangements for their trips before their autumn departures, Auto-

Train contends they will not use the services of Auto-Train and Eastern northbound in the late winter or spring. Auto-Train seeks to have a final report and order issued so that advertising and reservation operations can get into full swing to insure the success of Auto-Train's 1977-1978 season.

Protestant Autolog has replied to Auto-Train's motion, contending that the issues are not simple and uncomplicated. Autolog contends that the welfare of both Autolog and Auto-Train is at stake, and that the interest of the traveling public must be considered. Autolog contends that Auto-Train is eager to capture traffic from Autolog and that hasty analysis in this instance would not be beneficial.

SUPPORTING VERIFIED STATEMENTS

Three verified statements in support of the petition for modification have been filed by officers of Auto-Train, one by an officer of Eastern, and three by officers or owners of travel agencies. The Auto-Train statements indicate a desire on the part of Auto-Train to expand its services to the public. Auto-Train states that under this proposal, a traveler would have his automobile at his destination and would have the personal alternative of riding via Auto-Train's traditional "auto-train" service or of flying.

Auto-Train notes its preference for transporting both automobiles and passengers since the company grosses more money on such service, but Auto-Train states that it must be realistic in analyzing the needs and wants of the public. As Auto-Train indicates, many people prefer a plane ride of a few hours duration to a train ride lasting 17 hours (between Lorton and Sanford) or 23 hours (between Louisville and Sanford). Auto-Train states that, while it has not attempted to establish an exclusive, long-term relationship with any particular airline, it has entered into an agreement with Eastern, which is the only airline offering direct service between Washington-Orlando[2] and Louisville-Orlando. Auto-Train further states that if the petition is granted, both Auto-Train and Eastern could provide immediate service at almost any anticipated level of demand, because both carriers plan to use what is presently excess capacity available on their regular services.

Auto-Train contends that the public would benefit from this plan, since the public would be given a choice it does not now have. The carrier emphasizes that a traveler may, as a result of a single booking under the proposed service, arrange, for example, to fly from Washington to Orlando and have his automobile transported from the Washington area to the Orlando area. According to Auto-Train, no precisely comparable service is now being rendered.

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[2] Washington National Airport is the airport most convenient to Auto-Train's Lorton or Alexandria terminal. Orlando is the airport closest to Sanford and is approximately 25 miles away.

Auto-Train discusses alternative means by which a traveler could fly and have a car available at his destination. He could, for example, rent a car at his arrival airport. Auto-Train notes that this can be more expensive than using Auto-Train's service, particularly if the traveler rents a car for an extended period of time. Auto-Train notes also that renting a car is generally considered less satisfactory than having one's own automobile. Auto-Train also points out that a person's own automobile is a safe and convenient means for transporting the baggage and equipment needed by a traveler who anticipates a long stay.

Auto-Train contends that its present and proposed service is better than driveaway services available since with "auto-train" service, the automobile is transported in fully enclosed auto-carriers and arrives at the destination point without the wear and tear it would be subjected to in a driveaway service. Furthermore, Auto-Train states that considerable public dissatisfaction with some aspects or risks which seem to be inherent in driveway service is shown in *Aaacon Auto Transport—Invest. & Revoc. of Certif.*, 124 M.C.C. 493 (1976).

Auto-Train proposes to offer three basic joint-booking plans in conjunction with Eastern. Under the simplest and cheapest plan a traveler would receive only air transportation by Eastern between Orlando and Washington or Louisville, while his automobile would be transported over rail by Auto-Train. Under a second alternative plan a traveler would receive, in addition, one night's accommodation in a specified hotel in Louisville, Washington or Orlando, and ground transportation between hotel, airport or Auto-Train terminal as required. As an example of this service Auto-Train says that a traveler between Washington and Orlando would deliver his automobile to Lorton, where it would be processed and inspected like that of all other "auto-train" passengers' autos, and loaded aboard that day's regularly scheduled train as an additional automobile. If the traveler elects to spend the night in Washington, he would be provided limousine transportation to the specified Washington hotel the day his automobile would be transported, and then transportation would be provided from the hotel to Washington

National Airport the next day. On arrival in Orlando the traveler would be transported to Auto-Train's Sanford terminal to meet his car there.

A third plan includes all aspects of the second, but provides for an extended stay at a specified Orlando hotel, provides transportation to Disney World, and includes tickets to Disney World attractions. Auto-Train states that while these three alternatives are planned, it does not want to be confined to these three offerings, since other packages could be developed.

Under the carriers' proposal, Eastern, which is better situated to handle reservations, would handle booking arrangements. Auto-Train would, however, be in a position tentatively to accept reservations, should passengers call Auto-Train directly, and to have Eastern call the passenger back, within a short period, to confirm the individual's travel plans.

Under the marketing agreement between Auto-Train and Eastern, which is attached as an appendix to this report, for both Auto-Train's Lorton-Sanford and Louisville-Sanford routes, Eastern will be allotted at least 30 automobiles per "auto-train" trip up to 30 days before departure date, and 20 spaces between 30 and 21 days before departure date (with lesser allocations for certain holiday periods). Eastern, subject to availability, is to reserve sufficient seats on its aircraft for those passengers desiring the combined services. In instances where Eastern planes are solidly booked, passengers will be offered space on other airlines, subject to availability.

Auto-Train states that it has sufficient capacity to handle additional automobiles which might be transported as a result of a grant of the petition. Auto-Train further points out that since February 1977, it has received 20 new trilevel carriers which carry 50 percent more automobiles than did the original bilevel equipment and that with this increased capacity Auto-Train can readily increase revenues by filling up the additional space with additional automobiles. Auto-Train also states that it has terminal facilities and employees at each facility able to handle a substantially greater number of automobiles.

Auto-Train contends that the proposed operation would be profitable. The carrier states that if 10 additional automobiles per trip are booked, additional revenues of approximately $87,000 per month would be generated. Since the only additional costs incurred would be $3.41 per automobile for insurance and claims expense, the carrier would obtain approximately $85,000 per month in pretax income. According to Auto-Train, even if demand requires the use of additional trilevel auto carriers, after filling those that would only be partially loaded as a result of the regular "auto-train" service, the pretax profits each month could amount to as much as $46,000. Furthermore, Auto-Train states that there would be few additional costs to the carrier in providing the service anticipated by the petition and that there is virtually no economic risk inherent in the planned service, since no capital expenditures and no increased working capital would be required to institute the service.

Auto-Train states its belief that most of the people using the proposed service will be people not presently using Auto-Train, since the cost of the proposed service will be substantially higher ($377 for a party of two for air fare, auto transport, hotel and ground transportation versus $247 for two adults and auto transport under the present "auto-train" service). Auto-Train notes also that it is presently more profitable to carry the automobile than it is to carry the passenger. Therefore, if present Auto-Train users "jump" to the new rail-air service, Auto-Train's profitability would probably not suffer as a result. Moreover, Auto-Train hopes to attract customers who would not otherwise use its service. For instance, during fall, winter and spring, many prospective passengers decline coach service and seek bedroom accommodations which are often fully reserved far in advance[3]. Auto-Train states that people seeking bedrooms may drive if such rooms are unavailable. Auto-Train contends that if the proposed service is authorized, such individuals would be able to use Auto-Train's auto transport service and fly down to Florida and rest overnight in a hotel.

Auto-Train makes no attempt to predict the number of persons who will use the service proposed. The carrier does however cite a 1976 tourism study released by the Florida Department of Tourism which shows that for Florida visitors coming from the States of New York, Pennsylvania, New Jersey, Massachusetts, Connecticut, Maryland, and Virginia, 4,233,830 visitors arrived by auto and 3,201,700 arrived by air. From the States of Ohio, Michigan, Illinois, Indiana, Wisconsin, and Kentucky, 5,456,900 visitors to Florida in 1976 came by auto and 1,949,650 arrived by air. Of those flying, 39 percent or 2,009,026 from the involved market area, rent a car while in Florida. Over 40 percent of the visistors are over 50 years of age and may not desire to make the long drive, given a convenient alternative.

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[3] As of August 22, 1977, of the 123 trips scheduled southbound during October, November, December, and January, only 16 days have some bedrooms available.

Auto-Train contends that the service it proposes, in conjunction with Eastern is new and innovative in that it offers a travel option not now present, and that the service consequently serves the public convenience and necessity. Auto-Train indicates that despite the lack of promotional effort by the carriers pending Commission consideration of the petition, hundreds of inquiries about the proposed service have already been made of the carriers' reservations systems.

Auto-Train states that a major purpose in proposing the combined service is to reduce excess capacity on the trains it now runs. If additional automobiles are carried, Auto-Train points out, gasoline consumption will be cut and the quantity of pollutants in the air will be decreased, since a train is more energy efficient than, and would pollute the air less than, the automobiles it carries. Auto-Train also notes that, if it can maximize the use of its capacity through broadening its market with a minimal increase in cost, the company can improve its profitability which has been somewhat unstable during the company's 5 1/2 years of operations.

Eastern's statement reiterates Auto-Train's remarks that the proposed service would provide an energy-efficient means of transporting people and their automobiles to and from Florida. Eastern states that there is a large market to be tapped and that there have been over 500 telephone calls received in Eastern's reservations offices throughout the country seeking additional information. Eastern states also that 175 written inquiries from a 5-State area have been made of the New York office as a result of one article which appeared in several of the "Newhouse" papers, including the Newark Star Ledger. Eastern also notes that the Department of Transportation is on record in support of the proposal describing it as "innovative and imaginative" and one that should be encouraged.

Supporting statements have also been filed by travel agencies located in Washington, D.C., New York, N.Y., and Chicago, Ill. Citing their experience in the business, the travel agencies state their belief that there would be a widespread demand for the proposed service. The Washington agency states that it has sold tickets to people for use on Auto-Train's present service and the people have been pleased with the service. This travel agency also notes that its customers have liked the fact that Auto-Train carries automobiles in enclosed cars, protected from weather, possible pilferage, stones and other objects which could damage an unprotected automobile on the highways. This agency also notes that its experience indicates that people are generally unwilling to use auto driveaway services and to turn over their cars to unkown drivers to be driven to and from Florida or to use truckaway service and have their cars hauled on tractor trailers to and from Florida. The agency believes that the service proposed would attract people who are presently driving to and from Florida.

The Chicago travel agency also notes peoples' hesitance to use driveaway services since they do not like to turn their car over to a driver they do not know. This agency is aware of no other alternative means of transporting an automobile between Chicago and Flordia. The New York agency similarly notes problems with alternative means of shipping cars. The agency notes that normal rail freight is expensive and unpredictable, people do not like using driveaway services for reasons stated by the other travel agencies, and Autolog's motor transportaton of automobiles has limited capacity, is not well known, and does not offer the type of service which Auto-Train and Eastern propose to offer.

STATEMENT IN OPPOSITION

Opposing statements have been filed by protestants Aaacon and Autolog. Aaacon is a motor common carrier operating under a certificate of public convenience and necessity issued in No. MC-125808 (Sub-No. 1). Under this certificate, Aaacon is authorized to transport used passenger automobiles, over irregular routes, between all points in the United States, except Hawaii.

Aaacon states that it is the largest driveaway company transporting private passenger vehicles between points in Florida on the one hand, and, on the other, points in the United States. Aaacon states that it operates numerous offices throughout the country including offices in Washington, D.C., Louisville, Ky., and Orlando, Fla. Aaacon contends that if the petition is granted, Auto-Train would have authority to provide the transportation of used passenger vehicles without their owners, that this service would duplicate Aaacon's, and that there would be a potential for diversion of traffic away from Aaacon.

Aaacon states that it has the personnel, financial resources, and facilities to meet the needs of the shipping public in the area which Auto-Train seeks to serve. Aaacon further states that Auto-Train's proposed service would be less convenient than Aaacon's present service because individuals desiring to use the proposed service would be forced to drive long distances from population centers in order to have their cars placed on trains. Aaacon also contends that no indication has been given that the proposed service is needed or wanted by the general public, pointing out that, while supporting statements have been sumitted by Auto-Train, Eastern and travel agents, none have been submitted by prospective shippers. Aaacon further questions Auto-Train's financial ability to provide the proposed service without jeopardizing its current service.

Prostestant Autolog is a motor common carrier operating under a certificate issued in No. MC-140511, which certificate authorizes, in general, the transportation of used passenger automobiles and bargage, sporting equipment, and personal effects, in truckaway service, between points in Nassau County and New York City, N.Y., on the one hand, and, on the other, points in Dade, Broward, and Palm Beach Counties, Fla.

In its statements Autolog disputes the contention of the travel agency supporting the petition which had indicated that Autolog is not well known. Autolog states to the contrary that it is well known and that it has transported approximately 3,000 cars since its service began in November 1976. Autolog adds that it has recently concluded an agreement with Delta Airlines which would promote Autolog's service.

Autolog contends that if the petition is granted, Autolog will be driven out of the Virginia to Florida market. Autolog states that Auto-Train proposes to charge a less than compensatory rate for the transportation of automobiles, the rate structure to include a higher charge to ship automobiles for persons who travel on Auto-Train and a lower charge for persons who travel by plane. Autolog states that this may drive Autolog out of business and that Auto-Train would then raise its rates.

Autolog contends that Auto-Train's proposal will hurt the entire rail system because traffic will be diverted from publicly subsidized freight trains to the privately owned Auto-Train. Autolog contends that this would cause a deterioration of the entire rail transportation network. Autolog agrees that the proposed service would provide energy savings, but notes that there would also be a substantial energy saving if automobiles were shipped via Autolog. Autolog also notes that Auto-Train has, in another proceeding, involving authority sought by Autolog, argued that additional authority should not be granted to a company showing financial weakness. Autolog argues that this same argument should be applied to Auto-Train's petition here.

REPLY

In reply, Auto-Train states that for the period October 1977 through January 1978, over 1,000 passenger parties are on a waiting list for bedrooms on the regular "auto-train" service for the Lorton (Alexandria)-Sanford route. Four hundred of these will travel only if a bedroom is available. Auto-Train's reservations department has been calling these potential users to inform them of the proposed new joint service with Eastern. Auto-Train states that of those contacted, over one-third expressed an interest in the service or made tentative reservations. As of September 9, Auto-Train had over 70 reservations for the joint service with no marketing efforts and without sacrificing its present regular service.

Auto-Train attacks Autolog's contention that a grant of the instant petition will cause a deterioration of the rail system. Auto-Train notes that no rail carriers have protested its petition and that a grant would help both Auto-Train (a rail carrier) and the rail carriers to whom Auto-Train pays rent. Auto-Train also attacks the notion that freight trains are all subsidized noting that only ConRail is in this category.

Auto-Train states that there is no basis for Autolog's statement that Auto-Train will charge a noncompensatory rate. Auto-Train states that there is no tariff on file or any present proposal to differentiate between the rate for transporting an automobile, depending on whether it is or is not accompanied by a driver. Auto-Train also attacks the assertion that Auto-Train will in the future drive out service to the involved area and then raise its rates.

Auto-Train explains that it produced no supporting statements from "shippers" because of the nature of both its present and its proposed service. Auto-Train notes that there is no "shipper" in the conventional sense of one who moves only goods from one point to another. Auto-Train states that the prospective "shippers" are individuals from the general public, numbering in the millions, who reside in 33 States of the United States. Auto-Train states that it could have put forth time, money and effort to obtain large numbers of supporting statements from the public, but that such an effort would be wasteful since it is not clear how many such statements would be appropriate or necessary. Auto-Train notes also that it did not obtain public statements in the original proceedings for certification and that the Commission did not fault Auto-Train for failing to do this.

Auto-Train argues that the Commission has said that when passenger travel is involved, it has recognized that various forms of evidence may be submitted to establish that the proposed service will meet a public need, citing *White Rose Motor Club Broker Application*, 95 M.C.C. 101, 104 (1964), and *Goodman Broker Application*, 125 M.C.C. 223, 229 (1976). Auto-Train also notes that the Commission has said in *Cook Broker Application*, 119 M.C.C. 709, 715-716 (1974):

> *** in passenger proceedings it is not practical to attempt a strict application of such standards as relate to the transportation of property, cf. *Novak Contract Carrier Application*, 103 M.C.C. 555, 557 (1967), because the usual witness supporting an application involving passenger transportation generally lacks experience in evaluating existing transportation services. Specifically, a witness supporting an application involving sightseeing and pleasure tours will be testifying about leisure activities and usually will not be able to document most assertions concerning competing services. Thus, in this type of proceeding, it may be particularly difficult for an applicant to obtain precise testimony on the very matters we must consider in order to reach a proper decision, and the evidence that is produced must be considered with this difficulty in mind.

Auto-Train states that it has shown public support, not by producing vague, generalized statements by individuals who approve of and might use the service if offered, but by showing concrete demonstrations of intent to use and efforts to book the service. Auto-Train reiterates that it has shown that it has received many inquiries about the proposed service and that some tentative reservations have been made.

With respect to Aaacon's statements Auto-Train argues that the service proposed to be offered is quite different from Aaacon's driveaway service and that the public is entitled to a choice between alternative modes.

COMMENTS OF DEPARTMENT OF TRANSPORTATION

The Department of Transportation (DOT), has filed comments in this proceeding, which are not meant to express an opinion about the particular terms and conditions embodied in Auto-Train's petition, but which do express support for the kind of intermodal service that Auto-Train proposes. DOT gives several bases for its support of this type of service. DOT states its belief that: (1) no similar service is currently offered; (2) a substantial market for the service exists; (3) the service would accommodate a large class of travelers who have need of a car at their Florida destination but who are unable or unwilling to drive the car there themselves or to spend the otherwise requisite hours of train travel; (4) the service would increase railroad revenue; (5) diversion of passengers from rail travel would be minimal; (6) the service would result in greater revenues at a time when the financial viability of all segments of the railroad industry is a matter of national concern; (7) railroad operating efficiency would be enhanced since recently acquired Auto-Train equipment would enable Auto-Train to carry more automobiles than it can rail passengers; and (8) the newly proposed service and the extra automobile capacity would allow Auto-Train more nearly to balance its traffic at off-peak travel periods.

DOT further states, "We are also encouraged by the cooperative intermodal spirit evidenced in the Auto-Train petition. The Commission has long sought to stimulate intermodal travel becaue of its energy savings and operating efficiency. The present proposal is an innovative and imaginative way to reap these advantages."

DISCUSSION AND CONCLUSIONS

We will first consider the merits of Auto-Train's petition. Auto-Train has shown that there are people who would use the proposed service if offered. Without a promotion campaign, tenative reservations for the combined Auto-Train-Eastern service have been made by more than 70 parties. We agree with applicant that presenting a large volume of "supporting" statements from individuals who are potential users of the proposed service would have been of little help to us in our consideration. Auto-Train has substituted in the place of such statements, comments by travel agents and statements by individuals associated with Auto-Train attesting to the interest people have shown in the proposed service. These statements considered together with the evidence of tentative reservations, lead us to conclude that there is a public need for the service.

The proposed service is different from any service now offered, including the services of protestants. Furthermore, neither protestant has shown that the proposed service would divert any significant traffic that it now handles or that it could handle. Furthermore, any diversion that would occur could be attributed to an individual's preference for a different type of service. Driveaway and truckaway services represent competing modes of transportation for Auto-Train's present and proposed service. Each mode has advantages and disadvantages peculiar to it. The public has the right to choose from among these modes the means by which they will ship their automobiles and the means by which they themselves will travel, *Schaffer Transp. Co.* v. *U.S.*, 355 U.S. 83 (1957). By offering good service we believe that Aaacon, Autolog and Auto-Train can all continue to serve the different needs of different people.

Other arguments of protestants we find unpersuasive. The service proposed by Auto-Train will not, it seems, threaten Auto-Train's present service. At little or no extra cost, Auto-Train will be making its services available to many more people. As Auto-Train has stated there is little risk involved and no additional capital expenditures are required. We should also point out that Autolog's assertion that publicly subsidized freight trains could provide the service Auto-Train seeks to provide is erroneous. Autolog seems to have ConRail in mind and ConRail does not operate at or between the termini of the routes involved in this proceeding. Moreover, we believe that Autolog is mistaken in its apparent belief that this Commission would or should "favor" a publicly subsidized carrier to the detriment of a privately owned carrier.

We must, however, fulfill our statutory duty and consider the effect of the proposed new service on Amtrak. The Amtrak Improvement Act of 1973 (Public Law 93-149), which amended section 305(b) [45 U.S.C. 545(b)] of the Rail Passenger Service Act of 1970, requires that the Commission find that a proposed service by a person primarily engaged in auto-ferry service, (a) will not impair the ability of Amtrak to reduce its losses or to increase its revenues, and (b) is required to meet the demands of the public. Such finding was not required of Auto-Train's initial Alexandria-Sanford route authorization because of a statutory exemption. This division, in approving Auto-Train's service between Louisville and Sanford in 1974, specifically made the requisite findings. We must now consider the impact of this petition upon Amtrak.

Amtrak has not protested Auto-Train's petition. While this factor alone is not controlling, it is worth noting since apparently Amtrak does not anticipate any "impairment of its ability to reduce its losses or increase its revenues." We also find the division's "no harm to Amtrak" finding in 1974 to be helpful since in that case the services to be provided by Auto-Train were indentical to auto-ferry service being considered by Amtrak over a similar route. In the instant situation, the proposed service is less like that offered by Amtrak because of the cooperative agreement between Auto-Train and Eastern on air passenger service for individuals whose cars will be transported by Auto-Train.

In light of these factors and because we have no basis to believe that Amtrak would be harmed, we find that the proposed joint auto-ferry/air passenger transportation service will not imapir Amtrak's ability to reduce its losses or to increase its revenues. As stated earlier, we also find that the proposed service is required to meet the demands of the public. We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

We add at this point that while we approve Auto-Train's sought modification of its certificate to permit the proposed rail service in conjunction with air passenger service for owners or drivers of automobiles transported by rail, we are not approving a service which would transport an automobile without regard for the means of which the owner travels. We are not therefore authorizing a new "freight only" service in this instance. Such service would be a significant departure from the division's original intent in issuing Auto-Train's certificates in Finance Docket Nos. 26482 and 27508.

Finally, before us also in this proceeding is Auto-Train's motion to dispense with an initial decision and have the instant report and order designated as a final report and order. The purpose of this motion is to permit Auto-Train to initiate the new service proposed as soon as possible. Auto-Train argues that a substantial portion of its ancitipated business for the next year could be lost if the effective date of our action in this proceeding is delayed. While there is some merit to Auto-Train's contention, we decline in this proceeding, to make the report and order effective until after the parties have had the opportunity to file appropriate petitions for administrative review. In order to preserve the parties' right to an appeal in this matter, we must therefore deny Auto-Train's motion.

While the motion will be denied herein, we appreciate the need for an early effective date. Therefore, if no petitions are received by this Commission within 20 days from the date of service hereof, the instant report and order will take effect 30 days from the date of service hereof. In no case will the period for filing petitions be extended and any petitions which are filed will be handled in an expeditious manner.

FINDINGS

In Finance Docket Nos. 26482, 26483, 27508, and 27525, we find that under section 1(18) of the Interstate Commerce Act the present and future public convenience and necessity require modification of Auto-Train's certificates to permit Auto-Train to transport automobiles, unaccompanied by their drivers, but only pursuant to a joint booking for the substantially simultaneous transportation of an automobile by Auto-Train and of its owner or driver by an airline. We find also that the terms and conditions of the agreement between Auto-Train and Eastern and of the amendment to the operating agreement between Auto-Train and SCL and R.F.&P., are just and reasonable and that the transaction will be consistent with the public interest.

We find also that good cause has not been shown for granting Auto-Train's motion to dispense with an initial decision in light of the right of parties to file petitions for review of our action herein.

An appropriate order will be entered.

APPENDIX

Marketing agreement

AGREEMENT made as of the 19th day of August 1977 by and between EASTERN AIR LINES, INC., a Delaware corporation ("Eastern") and AUTO-TRAIN CORPORATION, a Florida corporation ("Auto-Train").

WITNESSETH

WHEREAS, Eastern is engaged principally in the business of regularly scheduled air transport of passengers on approved routes including to and from Florida; and

WHEREAS, Auto-Train is presently engaged principally in the business of operating a regularly scheduled rail transport service for passengers and their automobiles between Alexandria (Lorton), Virginia and Sanford, Florida and between Louisville, Kentucky and Sanford, Florida (collectively the "Terminals"); and

WHEREAS, Eastern and Auto-Train have agreed in principle to a joint marketing agreement pursuant to which the "auto-train^{tm}" automobile transport service, initially between the Terminals, will be publicly offered and sold as part of and in conjunction with transport by air.

NOW, THEREFORE, in consideration of the mutual promises hereinafter contained, the parties hereto agree as follows:

1. *The Service*

1.1 Commencing October 15, 1977, or on the date that all necessary approvals of the Interstate Commerce Commission are obtained, whichever is the later to occur, and continuing during the term of this Agreement, the parties will cause to be offered to the public a travel package (the "Service") consisting of rail transportation by "auto-train^{tm}" of automobiles between the Terminals in conjunction with air transportation by Eastern of passengers.

1.2 The Service shall be offered and provided only in accordance with the operating procedures set forth in Schedule A attached hereto and made a part hereof, or as the same may from time to time be amended by an addendum hereafter jointly executed.

Each such addendum, unless otherwise specifically provided therein, shall automatically terminate the effectiveness of the prior addendum.

2. *Marketing and Promotion*

2.1 Eastern will adopt and implement all appropriate procedures to utilize its reservation system for booking the Service and all related aspects thereof, including without limitation to book air and "auto-train^{tm}" transport, ground transportation and hotel accommodations. Eastern or its appointed agents will issue pre-paid vouchers for each of the components of the Service, constituting the travel package. Eastern will remit to Auto-Train in accordance with the procedures set forth in Schedule A.

2.2 Eastern and Auto-Train, both jointly and separately, will exercise their respective best efforts to promote and market the Service, maximize bookings therefor and enhance its public acceptance and image; and they will cooperate with each other in the development of related advertising and promotional programs. All proposed advertising, promotional programs, and printed materials for public release relating to the Service will be subject to the prior approval of Eastern and Auto-Train and will include the "auto-train^{tm}" logo. Neither party will implement any such program or activity without first (a) submitting the same for approval by the other party at least 15 days prior to the date of any intended submission to the newspaper, magazine, etc. thereof and (b) obtaining the approval of the other party, which approval shall not be unreasonably withheld. Each party will notify the other of its approval or disapproval within 5 days of its receipt of the proposed material, failing which the recipient shall be deemed to have given its approval.

3. *Covenants and Agreements With Respect to the Service*

3.1 Eastern and Auto-Train will exercise their best efforts to accommodate all reservations properly booked by and for customers for the Service.

3.2 To accommodate potential bookings for the Service, Auto-Train will generally hold and accept a predetermined number of automobile reservations as set forth in Schedule A for each travel date, provided, however, that within the established period (as set forth in Schedule A) immediately preceding each travel date, such reservations will be confirmed and accepted on a space available basis only.

3.3 All components of the tour package to be publicly offered as part of the Service, including without limitation the hotel accommodations, transfers, ground transportation, shall be subject to Auto-Train's prior approval, which approval shall not be unreasonably withheld.

3.4 Eastern shall pay Auto-Train, in advance of travel as stipulated in Paragraph 3.1 and 3.3 of Schedule A, the currently effective tariff, less any approved travel agent commissions payable thereon, for each automobile accepted and confirmed for transport by "auto-train^{tm}" pursuant to a booked reservation for a customer of the Service. From any refund made by Auto-Train in respect of a "no-show" or cancellation made within 72 hours of a scheduled "auto-train^{tm}" departure, Auto-Train may deduct and retain $50 of the fare previously paid.

3.5 Auto-Train will not be obligated to accept for rail transport any automobile delivered to it pursuant to a claimed reservation booked for the Service unless appropriate documents/vouchers are presented that such reservation was properly made as part of the Service.

3.6 Auto-Train may require the payment, as a condition of its release, of a reasonable storage fee for any automobile which remains at the destination terminal for a period in excess of 48 hours after its arrival.

4. *Liability and Indemnification*

4.1 In accordance with its regular procedures, Auto-Train will inspect, load, transport and uload each automobile delivered to the specified Auto-Train location for transport as part of the Service. Auto-Train will indemnify Eastern and hold it harmless from, against, for and in respect of any and all damages, losses, obligations, liabilities, claims, costs and expenses, including reasonable attorneys' fees and other costs and expenses incident to any suit, action, claim or proceeding suffered, sustained, incurred or required to be paid by Eastern by reason of the loss, destruction of, damage to or delay in the delivery of an automobile or its contents while the same is in the exclusive custody, control and possession of Auto-Train pursuant to the Service.

4.2 Eastern will indemnify Auto-Train and hold it harmless from, against, for and in respect of any and all damages, losses, obligations, liabilities, claims, costs and expenses, including reasonable attorneys' fees and other costs and expenses incident to any suit, action, claim or proceeding suffered, sutained, incurred or required to be paid by Auto-Train by reason of (a) injury to, or death of any Eastern passenger which such passenger is traveling under the exclusive custody and control of Eastern pursuant to the Service and (b) loss, destruction of or damage to any such passenger's property while the same is in the exclusive custody, control and possession of Eastern pursuant to the Service.

4.3 If a suit, action, claim or proceeding is at any time brought or asserted against either Eastern or Auto-Train for an alleged liability which may render the provisions of Paragraph 4.1 or 4.2 operative, the indemnifying party shall, at its own cost and expense and without cost or expense whatsoever to the other party, defend, contest or otherwise protect against any such suit, action, claim or proceeding. If the indemnifying party fails timely to defend, contest or otherwise protect against any such suit, action, claim or proceeding, the other party shall have the right to defend, contest or otherwise protect against the same and recover the entire cost thereof from the indemnifying party including, without limitation, reasonable attorneys' fees, disbursements and all amounts paid as a result of such suit, action, claim or proceeding or the compromise or settlement thereof.

5. *Termination of Agreement*

Either party may terminate this Agreement upon 60 days prior written notice to the other; however, bookings accepted by either party prior to the termination date will be honored by both parties.

6. *Notices*

Any notices permitted or required to be given hereunder shall be in writing and either delivered by hand, sent by certified mail (return receipt requested) or sent by telegram with confirmed delivery:

If to EASTERN:

Address:	Miami International Airport Miami, Florida 33148
Attention:	Vice President-Marketing Support

If to AUTO-TRAIN:

Address:	1801 K Street, N. W. Washington, D.C. 20006
Attention:	Senior Vice President

Notice shall be deemed to have been received on the date delivered to the recipient, regardless of any other date indicated thereon.

7. *Waiver*

The failure of either party at any time to require the performance by the other party of any terms or conditions hereof shall in no way affect the right of that party thereafter to enforce the same, nor shall the waiver by either party of any breach of any of the terms or conditions hereof be taken or held to be a waiver of any succeeding breach of any such term or condition, or as a waiver of the term or condition itself.

8. *Amendment*

This agreement may not be amended except by a written instrument duly signed by authorized officers of the parties thereto.

9. *Headings and Captions*

The headings and captions used in this Agreement have been inserted solely for convenience of reference and shall not affect or be deemed to affect, the meaning of any provisions of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the day and year first above written.

EASTERN AIR LINES, INC.

By: ____________________________

Date: __________________________

AUTO-TRAIN CORPORATION

By: ____________________________

Date: __________________________

SCHEDULE A

AUTO-TRAIN CORPORATION
EASTERN AIR LINES, INC.

MARKETING AGREEMENT

I. *RESERVATION AND CANCELLATIONS PROCEDURES*

1.1 Eastern Air Lines shall offer to the public "auto-train^{tm}" service in three different versions.

A. "Meet Your Car in Florida Plus Walt Disney World" (Inclusive Tour Package)

o One-way transportation for automobile on the "auto-train^{tm}" system.

o Ground transportation from the Lorton, Virginia "auto-train^{tm}" terminal to the Washington National Airport or from the Louisville, Kentucky "auto-train^{tm}" terminal to the Louisville Standiford Field.

o Two nights accommodations at the Sheraton Jetport Hotel, Orlando.

o One Walt Disney World nine-attractions ticket book per person.

o Complimentary ground transportation between the Sheraton Jetport Hotel and McCoy Airport and the hotel and Walt Disney World.

o Ground transportation from the Sheraton Jetport Hotel to the Sanford "auto-train^{tm}" terminal.

o One-way air transportation from Washington National Airport to Orlando McCoy International Airport or from the Louisville Standiford Field to Orlando McCoy International Airport.

B. "Meet Your Car There" (Prepaid Component Plan)

o One-way transportation for automobile on the "auto-train^{tm}" system.

o Ground transportation from the departure "auto-train^{tm}" terminal to the Washington National Airport, Louisville Standiford Field, or Orlando McCoy International Airport.

o Ground transportation from the airport-Washington National, Orlando McCoy, or Louisville Standiford Field - to the "auto-train^{tm}" destination terminal.

o One night's accommodations in either Louisville Holiday Inn South, Washington Crystal City Holiday Inn or Orlando Sheraton Jetport Hotel.

o Complimentary (free) ground transportation to/from hotel and airport courtesy of the hotel.

o One-way air transportation between Washington National and Orlando McCoy or Louisville Standiford and Orlando McCoy Airports.

C. Non-Prepaid Rail Plan

o One-way air transportation between Washington National Airport and Orlando McCoy Airport or between Louisville Standiford Field and Orlando McCoy Airport.

o One-way automobile transportation on the "auto-train^{tm}" system.

1.2 Passengers shall be instructed that automobiles are to be dropped off at the departure terminal on the day of departure after 8:00 a.m., up to one hour before departure, and that no automobile will be accepted later than one hour prior to scheduled departure.

1.3 Eastern Air Lines shall provide and Auto-Train shall pay the lease cost of a "codacom" system at the Auto-Train reservations department. Communications between Auto-Train and Eastern Air Lines will take two forms: 1) Eastern's codacom equipment in the Auto-Train reservations office in Washington, D.C. and 2) telephone.

1.4 Eastern will generate the following types of meassages to Auto-Train within 24 hours after the information has been received by Eastern.

o Booking messages - Eastern will transmit complete passenger travel information including:

Customer's name and address
Telephone number identified as to home or business
Customer's number in party
Departure date of automobile and departure terminal
Automobile year, make and model
Train number
Type of package

o Cancellations messages - Eastern will transmit a cancellation message for each change of travel date, cancellation due to non-payment, or customer-requested cancellation.
o Additional data as may be required.

1.5 Auto-Train will generate the following types of messages to Eastern:

o Availability messages - Within twenty-one days of departure, after Eastern has returned the automobile allotment. Eastern will sell Auto-Train from availability by confirming any date not posted as closed for sale. Auto-Train will advise Eastern when any date or train is not available. The information will be programmed into the Eastern computers and will be immediately available to Eastern's agents.
o Referalls
o Additional data as may be required.

1.6 The codacom equipment will be comprised of:

1 - 1001 Processor
1 - 4101 Raytheon CRT and keyboard
1 - 3406A Centronics Printer
1 - Data Set
75' Cable

1.7 Sales messages will indicate whether the sale is from Eastern, a Travel Agent (indicated by name and address of travel agency), or from an Auto-Train referral.

1.8 Ticketing - The three types of bookings which can be arranged by Eastern require three types of ticketing formats:

o *"Meet Your Car in Florida Plus Walt Disney World"* - After full payment to Eastern, Eastern will issue a tour order to the customer. Ten days prior to departure, Eastern will deliver the vouchers (to include ground transportation, "auto-train^{tm}" automobile only service, hotel accommodations, and airline transportation) to the Auto-Train Sanford Terminal addressed:

Auto-Train Corporation
Attn: Accounting Department
1801 K Street, N. W.
Washington, D.C. 20006

Upon arrival at the Auto-Train station, the customer will present the tour order to the ticket agent, who will give the customer his prepaid voucher and valid Auto-Train coupon. Walt Disney World ticket books will be included in the customer's voucher packet.

o *"Meet Your Car There"* - After full payment is made to Eastern, a miscellaneous charges order (MCO) will be issued, and the customer given the passenger receipt. Eastern will mail all prepaid vouchers directly to the customer or travel agent as instructed by the purchaser. Upon arrival at the Auto-Train terminal to place his car on board, the customer will present a voucher (same as for the tour customer) for payment of the "auto-train^{tm}" transportation of his automobile and receive a valid Auto-Train coupon.

o *Non-Prepaid Component Plan* - This plan is not prepaid to Eastern. Minimum booking requirements are one-way car passage on the "auto-train^{tm}", and one-way air transportation on Eastern. Eastern will transmit this booking to Auto-Train immediately and will advise the customer of Auto-Train's deposit/full payment policy depending upon the time of booking. This service may be purchased up to 48 hours before departure time. Auto-Train will issue an "auto-train^{tm}" ticket directly to the customer.

1.9 Auto-Train Referrals - The customer is to be advised that Eastern will return his call within one hour:

o The Miami TeleSell Desk will be manned Monday-Friday from 8:00 a.m. to 6 :00 p.m. and on weekends from 9:00 a.m. to 5:30 p.m. Any call received until 5:00 p.m. will be called on the same day (by 6:00 p.m.). Any customers calling after 5:00 p.m. will be advised that Eastern will return their call the following morning.

o If the customer prefers that Eastern call at a specified date and time (other than within the one-hour commitment time) Auto-Train will so indicate on the referral card to be transmitted to Eastern.

1.10 If a referral customer subsequently calls Auto-Train to alter or cancel his reservations, or if Auto-Train cancels a reservation because no deposit was received, a message (or phone call prior to codacom installation) indicating such change will be transmitted to Eastern.

1.11 Auto-Train will give to Eastern the following information for each referral customer's travel needs:

Customer name and address

Customer's home and business phone contacts, including area codes and the name of the city in which the phones are located

Number in party

Departure date of automobile

Auto-Train itinerary - i.e. Lorton to Sanford

Car year, make and model (spelled out)

Call back time (if other than one-hour commitment time)

Comments

1.12 Passenger Costs - Eastern and Auto-Train will jointly agree on the hotel, transfer and other pricing in the packages.

A. Hotels in the packages who normally offer courtesy transportation will be requested to provide service to and from their respective airports.

B. Auto-Train reservations which are canceled less than 72 hours before departure date are subject to a $50 late-cancellation penalty to the Auto-Train Corporation. Customer vouchers will clearly stipulate Auto-Train's cancellation penalty.

2. *ALLOCATION OF AUTOMOBILE AND PASSENGER SPACE*

2.1 Auto-Train will give Eastern Airlines an allotment of automobile spaces for each scheduled "auto-train^{tm}." Eastern shall freely sell from its inventory up to 21 days before departure date for the "Meet Your Car There" Plan and up to 48 hours before departure on a space available basis for the Non-Prepaid Component Plan.

2.2 The Eastern allocation shall be as follows:

A. Eastern Route - Lorton, Virginia to/from Sanford, Florida

Eastern shall be allotted at least 30 automobiles per scheduled "auto-train^{tm}" trip up to 30 days before the date of departure, and shall be allotted 20 automobiles per scheduled "auto-train^{tm}" trip between 30 and 21 days before the date of departure. Twenty-one days before departure date, all unsold automobile spaces will be returned to the "auto-train^{tm}" inventory.

B. Midwestern Route - Louisville, Kentucky to/from Sanford, Florida.

Eastern shall be allotted at least 30 automobiles per scheduled "auto-train^{tm}" trip up to 30 days before the date of departure, and shall be allotted 20 automobiles per scheduled "auto-train^{tm}" trip between 30 and 21 days before the date of departure. Twenty-one days before departure date, all unsold automobile spaces will be returned to to the "auto-train^{tm}" inventory.

C. During the holiday seasons of Christmas (December 15 - January 15) and the week before and after Easter, Auto-Train will allocate at least 10 automobile spaces per scheduled departure for each of its trains.

2.3 Subject to availability, Eastern shall reserve sufficient seats on its aircraft for those passengers desiring the joint service. In those cases where Eastern planes are booked full, the passenger will be offered space on other airlines, subject to availability.

3. ***PAYMENT SCHEDULE***

3.1 The payment schedule for "Meet Your Car in Florida Plus Walt Disney World" and "Meet Your Car There" shall be as follows:

A. For all reservations made more than 30 days before departure date, passenger payment in full is due to Eastern Airlines 30 days before travel date and Auto-Train receives full payment from Eastern at least 21 days before departure date.

B. For all reservations made between 30 and 21 days before departure date, passenger payment in full is due immediately to Eastern and Auto-Train will receive full payment from Eastern at least 10 days before departure date.

C. There are no package or tour sales within 20 days of departure date.

3.2 The payment schedule for "Non-Prepaid Rail Plan" shall be as follows:

A. Eastern Airlines shall make reservations and sell plane space but shall direct customers to comply with the normal Auto-Train payment schedule.

B. For all reservations made 41 or more days before date of travel, a minimum $50 deposit is required within 10 days of the booking. Upon receipt of deposit payment, Auto-Train will send a confirmation reflecting the balance due and required pay date. All payments are to be sent to:

Auto-Train Corporation
Post Office Box 19348
Washington, D. C. 20036

Full payment is required 30 days before date of departure.

C. For all reservations between 40 days and 10 days before the departure date, full payment is required immediately payable to the Auto-Train Corporation.

D. For all reservations made within 9 days of departure date, full payment will be required at the departure terminal and no payment should be mailed to Auto-Train Corporation.

E. Payment may be made by case, check, money order, VISA, BANKAMERICARD, or MASTER CHARGE.

F. Customers shall be notified to note on the face of checks and money orders:

o Name of person holding the reservation
o "auto-train^{tm}" departure date
o Train number (i.e. # 3, # 4, # 5, # 6)

3.3 The payment terms will be:

A. Auto-Train will pay a maximum of 10% commission for travel agent sales on the Auto-Train portion of the Inclusive Tour "Meet Your Car in Florida Plus Walt Disney World" and "Meet Your Car There" packages. No commission is payable for Auto-Train referrals, Eastern sales, or Non-Prepaid Rail sales.

B. Eastern shall process full payment, less appropriate commission, within 10 days of receipt from passenger to Eastern, and deliver to:

Auto-Train Corporation
Post Office Box 19348
Washington, D.C. 20036

3.4 Auto-Train may charge $10 per day for each automobile not claimed and removed from the Auto-Train property within 48 hours of the scheduled pick-up time at the destination terminal. Automobiles may be picked up between 9:30 a.m. and 4:30 p.m. each day.

EASTERN AIR LINES, INC.

By: ______________________________

Date: ______________________________

AUTO-TRAIN CORPORATION

By: ______________________________

Date: ______________________________

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, Acting as an Appellate Division, held at its office in Washington, D.C., on the 28th day of September 1977.

FINANCE DOCKET NO. 26482

AUTO-TRAIN CORP., OPERATION RAIL PASSENGER AND AUTOMOBILE TRANSPORT SERVICE, BETWEEN ALEXANDRIA, VA., AND SANFORD, FLA.

FINANCE DOCKET NO. 26483

SEABOARD COAST LINE RAILROAD COMPANY, RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY—OPERATING AGREEMENT—AUTO-TRAIN CORP.

FINANCE DOCKET NO. 27508

AUTO-TRAIN CORP., OPERATION RAIL PASSENGER AND AUTOMOBILE TRANSPORT SERVICE, BETWEEN LOUISVILLE, KY., AND SANFORD, FLA.

FINANCE DOCKET NO. 27525

AUTO-TRAIN CORP., SEABOARD COAST LINE RAILROAD COMPANY—OPERATING AGREEMENT—LOUISVILLE AND NASHVILLE RAILROAD COMPANY

Consideration of the matters and things involved in these proceedings having been made, and division 3, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the petition filed herein on June 16, 1977, be, and it is hereby, granted and that the certificates of Auto-Train Corporation issued in Finance Docket Nos. 26482 and 27508, be, and they are hereby, modified to permit Auto-Train Corporation to transport automobiles unaccompanied by their drivers, but only pursuant to a joint booking for the substantially simultaneous transportation of an automobile by Auto-Train Corporation and of its owner or driver by an airline.

It is further ordered, That the motion to dispense with an initial decision, filed by Auto-Train Corporation on August 22, 1977, be, and it is hereby, denied.

It is further ordered, That this order shall be effective 30 days from the date of service hereof.

By the Commission, Division 3, Acting as an Appellate Division, Commissioners Brown, MacFarland and Christian.

NOTE: The strict time constraints imposed by the Railroad Revitalization and Regulatory Reform Act of 1976 make it necessary to expedite all proceedings concerning common carriers by railroad. Accordingly, requests for extensions or postponements of due dates for filing an appeal will be scrutinized closely and will be granted only upon a showing of extraordinary circumstances. Any appeal must be filed within 20 days after service of the initial decision or within such further period (not to exceed 20 days) as may be authorized. However, as noted in the report herein, no extensions of time are contemplated.

DECISION

FINANCE DOCKET NO. 28256

MENDOCINO COAST RAILWAY, INC.—LEASE AND OPERATE—CALIFORNIA WESTERN RAILROAD

Decided August 18, 1978

By order served December 8, 1977, we modified a prior order of the Commission, Review Board Number 5, to authorize the terms and conditions of an extended lease agreement between Mendocino Coast Railway, Inc. and California Western Railroad (applicants) dated November 7, 1977. The modification was made subject to the same protections for employees as enacted in and developed pursuant to section 405 of the Rail Passenger Service Act (RPSA). These conditions were set out in *Oregon Short Line R. Co.—Abandonment—Goshen,* 354 I.C.C. 76 (1977) (*Oregon Short Line I),* and we said in our order served December 8, 1977, that these conditions were the same as those previously imposed by the review board (i.e., the same conditions as those imposed in *Oklahoma Ry. Co. Trustees Abandonment,* 257 I.C.C. 177 (1944) *(Oklahoma),* as supplemented by the applicable provisions of section 405 of RPSA).

The Brotherhood of Locomotive Engineers (BLE) has appealed on the issue of the propriety of the labor protection imposed. BLE objects to the labor conditions, saying that they do not satisfy the minimum requirements of section 5(2)(f) of the Interstate Commerce Act (act), as amended by the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4R Act). BLE says that the conditions are insufficient for and inapplicable to the present transaction. BLE argues that the protections of sections 4 and 5 of the Washington Job Protection Agreement of 1936 (WJPA), involving prior notice and negotiation, should be imposed in this case.

Applicants, in reply, say that the Commission has already provided complete and adequate protection for employees.

Section 5(2)(f) of the act requires employee protection "no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565)." In the past, the Commission imposed different employee protective conditions in different types of section 5(2) cases. The *Oklahoma* conditions were ordinarily imposed in lease cases. Therefore, in imposing the *Oklahoma* conditions, as supplemented by the applicable provisions of section 405 of RPSA, the review board in this case satisfied the minimum requirements of section 5(2)(f).

In changing the language of the review board's labor protective conditions in our order served December 8, 1977, we adopted the language of *Oregon Short Line I* and said that we were not changing the measure of protection afforded by the review board's order. The Commission found this level of protection sufficient to satisfy the requirements of section 5(2)(f) in *Oregon Short Line R. Co.—Abandonment Goshen*, 354 I.C.C. 584 (1978) (*Oregon Short Line II*). In *Oregon Short Line II*, the Commission considered arguments similar to those presented here by BLE and concluded that *Oregon Short Line I* conditions were appropriate but modified certain language to make the conditions specifically applicable to abandonments.

In Norfolk and Western Ry. Co.—Trackage Rights—BN, 354 I.C.C. 605 (1978), Division 1, Acting as an Appellate Division, applied *Oregon Short Line II* to trackage rights situations. In so doing, Appellate Division 1 rejected arguments that section 5(2)(f) of the act acquires imposition of sections 4 and 5 of WJPA. Appellate Division 1 also specifically stated in *Norfolk and Western, supra*, at 607, that the Oklahoma conditions (which have been imposed in both trackage rights and lease cases) do not contain protection equivalent to sections 4 and 5 of WJPA.

We believe that the conditions set out in *Norfolk and Western, supra*, provide the appropriate protections for the present lease situation. While the definition of "transaction" in *Norfolk and Western*, at 610, does not include leases, the conditions are otherwise applicable. For the purposes of this case, the term "transaction," as used in *Norfolk and Western, supra*, at 610, includes "lease or operation by one rail carrier of the properties, or part of the properties, of another rail carrier."

In applying the *Norfolk and Western* conditions, we are not in to much changing the level of protection previously imposed in this proceeding. We will modify our prior decision, however, to make proper and up-dated reference to the appropriate labor protective conditions.

This decision does not significantly affect the quality of the human environment.

It is ordered:

BLE's petition is denied.

The order of the Commission, Division 3, Acting as an Appellate Division, served December 8, 1977, is modified to provide for the same labor protective conditions as those imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN,* 354 I.C.C. 605 (1978), with the definitional change added in this decisionmaking the conditions applicable to leases.

Except as modified in this decision, the order served December 8, 1977, shall be in full force and effect.

Copies of this decision will be placed in the public docket and served upon the parties in Finance Docket No. 28387.

The parties are advised that this decision is administratively final under the provisions of section 17(9)(c) of the Interstate Commerce Act. Any further administrative appeal can be entertained only under section 17(9)(d) of the act which permits such an appeal only if the entire Commission finds that a matter of general transportation importance is involved, that clear and convincing new evidence has been presented, or that there exist changed circumstances which would materially affect the decision made here. Such an appeal must be filed within 20 days of the date of service of this decision.

By the Commission, Division 3, Acting as an Appellate Division, Commissioners Brown, Clapp, and Christian.

DECISION

AB-1 (SUB-NO. 56)

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY ABANDONMENT BETWEEN MARSHALL JUNCTION AND VESTA, IN LYON AND REDWOOD COUNTIES, MINNESOTA

Decided September 13, 1978

On appeal, application to abandon a line of railroad in southwest Minnesota granted, subject to conditions.

Louis T. Duerinck, Christopher A. Mills, and *Anne E. Valle* for applicant.

E. E. Berglund and *Richard L. Kelly* for protestants.

STAFFORD, *Commissioner:*

On October 4, 1976, the Chicago and North Western Transportation Company (C&NW) filed notice of its proposal to abandon a line of railroad extending approximately 37.3 miles between Marshall Junction and Vesta, in Lyon and Redwood Counties, MN. The application is governed primarily by the provisions of section 1 of the Interstate Commerce Act (act) in effect prior to enactment of the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law No. 94-210 (February 5, 1976), and by the abandonment regulations contained in 49 CFR 1121 prior to revision in Ex Parte No. 274 (Sub-No. 2), *Abandonment of Railroad Lines and Discontinuance of Service,* 41 F.R. 48520 (1976), 42 F.R. 24325 (1977), and 43 F.R. 7623 (1978). The Commission held oral hearing on the matter in November 1977, and the presiding Administrative Law Judge entered an initial decision on March 1, 1978, denying the application. The applicant filed an appeal to the decision, and shipper protestants have replied.

In denying the abandonment, the Administrative Law Judge found that the protestants had rebutted the presumption of unprofitability arising from the evidence of operations on the line during the years 1974 through 1976. Noting that the local area suffered a severe drought during those 3 years, depressing grain production, he considered the period nonrepresentative. A high percentage of the traffic moving over the line consists of agricultural products, and he determined that a close relationship exists between the amount of grain available and the level of railroad service needed. He also determined that the C&NW had contributed to the traffic decline by offering poor, unresponsive service, characterizing the applicant's maintenance of the line as a "process of neglect." The Administrative Law Judge concluded that, although the evidence lacked sufficient detail to support a finding of deliberate downgrading, the applicant could not defend the claims of poor service by pointing out the poor condition of the track.

Our conclusions differ from those of the Administrative Law Judge. We find the statement of facts in the initial decision to be substantially correct, and, except as modified or supplemented, we adopt it as our own.

Discussion and Conclusions

Throughout this proceeding the C&NW has acknowledged that it has not maintained the line to minimum Federal Railroad Administration class I track safety standards and it attempts to characterize its maintenance policy as a "reasonable act of economy." We do not agree with the applicant's depiction. Where a railroad has so extensively deferred maintenance that its line requires upgrading to meet class I standards, that maintenance policy may violate common carrier duties. *Winnebago Farmers Elevator Co.* v. *Chicago & N. W., I.C.C.* (1978). We concur with the Administrative Law Judge that here the record lacks the detail necessary to find deliberate downgrading, but the railroad's neglect of its trackage does bear directly upon the weight accorded evidence of past operations. Data concerning past performance are simply a tool to predict the future level of use and may be disregarded if nonrepresentative. See *Chicago and North Western Transp. Co.—Abandonment,* 354 I.C.C. 114, 118-19 (1977).

Had the C&NW performed adequate maintenance in the past few years, it would have sustained greater losses than it actually incurred from operations on the line,[1] assuming the same amount of traffic. On the other hand, the evidence reveals that during those years, in part because of the low level of maintenance, the applicant's service on the line was probably inadequate, and that the poor service held down freight volume. The record also indicates that other factors, a severe drought in the area, downward adjustments in the agricultural marketplace, and railroad car shortages throughout the Midwest further depressed traffic demand for the same period. Thus, partly because of the C&NW's egregious deferral of maintenance and the concomitant poor service, and partly because of unusual weather, economic, and transportation conditions, historic operations do not accurately reflect potential utilization of the line. We must, therefore, look to other evidence for indications of future use and the costs associated with that use.

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[1] The line realized a profit of $7,540 in 1974, but sustained losses of $56,322, $53,219, and $31,337 on operations in 1975, 1976, and the first 6 months of 1977, respectively.

The primary commodity shipped on the line is grain and, while the C&NW's witness testified that, given good market and weather conditions, the area would generate approximately 250 carloads per year, shipper witnesses indicated that they could tender a total of about 775 carloads per year. Neither the Commission nor the parties can predict with mathematical exactitude the line's future use, and although the applicant's estimate appears conservative, the shippers' projections seem correspondingly overoptimistic. Moreover, the figures introduced represent rough estimates at best, and do not include fertilizer and other agricultural traffic that we would expect to materialize were the line to handle a large amount of grain.[2] Rather than attempt to develop a more accurate forecast, we believe it more instructive to determine the costs of continued operations, ascertain the usage level at which revenues equal total avoidable costs, and compare that point with the range of realistic traffic potential.

The C&NW has presented extensive evidence regarding the costs of providing future service over this line, and the protestants have not seriously challenged the figures introduced. We note, however, that the applicant has argued that return on value of the line (as measured by net salvage value) constitutes an increment of "true economic" or "actual" loss. The railroad cites the regulations promulgated in Ex Parte No. 274 (Sub-No. 2), *supra,* in support of its position. As noted above, the regulations adopted in Ex Parte No. 274 (Sub-No. 2), do not govern this proceeding, although we may employ them as a guide in selecting costing methodologies for "old" abandonment applications. See ***Baltimore and Ohio R. Co. Abandonment,*** 354 I.C.C. 67, 74 (1977). The C&NW has computed its off-branch avoidable costs by the variable unit cost method specified in the new regulations, for instance, and we have previously found that practice acceptable. *Id.* In a long series of decisions, however, the Commission has consistently refused to consider interest on salvage value of the line in determining the losses incurred from operations,[3] and on that basis we shall exclude return on investment as an element of loss.

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[2] In 1974 and 1975, the line handled 171 and 163 carloads of other traffic while handling 639 and 177 carloads of grain, respectively.

Since we have taken cognizance of Ex Parte No. 274 (Sub-No. 2), we should point out that the applicant errs in characterizing return on investment as a part of the line's "actual loss" calculated under the new regulations. Under section 1a(6) of the act, financially responsible persons may offer assistance to enable continuation of rail service over lines authorized for abandonment. Upon an offer of financial assistance, section 1a(7) of the act requires the Commission to ascertain the extent to which the avoidable costs of providing service plus a reasonable return on the value of the rail properties exceed the revenues attributable to the line. This estimated subsidy figures, called for by the new regulations as part of a necessary exhibit, constitutes not the loss from operations but rather the amount of financial assistance projected as necessary to cover avoidable losses and subsidization expenses and provide a fair return. See 49 CFR 1121.45 (1977), line 17. Return on value of the line simply represents a congressionally mandated level of compensation for the operator of a subsidized rail line. The estimated subsidy consists of this compensation element plus the projected excess of costs over revenues. Thus the Commission demands return on investment information primarily to facilitate the determination of estimated subsidy under section 1a(7), and not to evaluate the merits of abandonment. We may consider return on value as a benefit accruing to the applicant on abandonment, however. See ***New York, N. H. & H. R. Co. Abandonment,*** 324 I.C.C. 345, 350 (1965) and ***Chicago, B. & Q. R. Co. Abandonment,*** 271 I.C.C. 261, 273 (1948).

The avoidable cost elements included in the C&NW's calculations for the subsidy (future) year appear to be accurate and reasonable projections from prior years' expense data and, as mentioned above, the protestants submitted no rebuttal. Although the maintenance-of-way and structures estimate appears rather high as compared with historical expenditures, clearly the applicant would have to spend much more than it has in the past to keep the line serviceable. Column I of the attached appendix A sets forth projected costs, together with attributable revenues, based on 41 round trip cycles and 192 carloads of freight per year. Other columns shown the per car amount for variable items, the revenues and costs at 775 carloads of freight, and the revenues and costs at 1,203 carloads (the point at which revenues equal total avoidable costs). Appendix B contains similar data based on 65 round trip cycles per year, which would have a revenue equal total avoidable costs point of 1,322 carloads.

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[3] *E.g., Penn Central Co. Abandonment,* 347 I.C.C. 223, 225 (1971); *New York, N. H. & H. R. Co. Abandonment,* 324 I.C.C. 345, 349-50 (1965); *Southern Pac. Co. Abandonment,* 312 I.C.C. 685, 693 (1961), affirmed *sub nom. Arizona* v. *United States,* 220 F. Supp. 337 (D. Ariz. 1963); *Chicago, B. & Q R. Co. Abandonment,* 271 I.C.C. 261, 273 (1948); and *New York Central R. Co. Abandonment,* 254 I.C.C. 745, 755 (1944) reconsideration denied, 254 I.C.C. 799 (1944).

No reasonable estimate of the line's future traffic[4] would produce revenues approaching the total avoidable costs of continued operations. The point at which revenues would cover expenses lies far above even the 810 carload level realized in 1974, when the so-called "Russian grain deal" may have stimulated increased shipping on the line. Compare *Chicago and North Western Transp. Co.—Abandonment,* 354 I.C.C. 114, 119 (1977). We do not believe, and the record does not demonstrate, that the area would ever supply the line with an amount of freight exceeding the 1974 aggregate by this large an amount. Even were we to assume that the shippers' projections are accurate, we still could not find that 775 carloads of grain would galvanize a penumbra of other traffic adequate to materially reduce the deficit incurred transporting that grain. We conclude that continued operations at any realistic traffic level would force the C&NW to incur substantial losses, to the detriment of both the railroad and interstate commerce. We must weigh the burden which continued operations would impose on interstate commerce against the inconvenience and loss which abandonment might inflict on particular communities and commerce. See *Colorado* v. *United States,* 271 U.S. 153, 168 (1976). Undoubtly, abandonment of the line would adversely effect some local patrons by raising shipping costs and removing market flexibility. Most of the stations along the line are within approximately 15 paved highway miles from an alternative rail station, however. Increased transportation costs and shipper inconvenience are typical effects of virtually all abandonment proceedings and here do not outweigh the detriment to the public of continued operation of uneconomic and excess facilities. Compare *Chicago and North Western Transp. Co.—Abandonment,* 354 I.C.C. 1, 7 (1977) and *Penn Central Transp. Co.—Abandonment,* 342 I.C.C. 139, 144 (1972).

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[4] Although one witness contended that the line could annually supply about 3,000 carloads and another witness estimated 1,500-2,000 carloads, the predictions lacked any substantiation through underlying indicators of demand, types of traffic, identities of shippers, et cetera.

We emphasize that granting abandonment signifies neither reward for nor condonation of the C&NW's past maintenance and service policies with respect to the line. Because of those policies we have viewed the conflicting traffic projections in the light most favorable to protesting shippers, but the amount of freight reasonably anticipated would still not cover the costs of operation, much less amortize any rehabilitation expenditure. Although the C&NW should have expended more to maintain the line, the fact that it did not do so does not alter the real cost of rehabilitation today, nor reduce the burden of that cost on the applicant and interstate commerce. See *Chicago and North Western Transp. Co.—Abandonment,* 354 I.C.C. 1, 6 (1977).

We direct the protestants' attention to the procedures for preservation of rail freight service set forth in the attached notice. By using that program the direct beneficiaries of continued service would bear the cost of operations through financial assistance payments, and local interests would retain the benefits of rail service without imposing an undue burden on the C&NW and interstate commerce.

In an environmental threshold assessment survey, the Commission's Section of Energy and Environment concluded that the proposed abandonment would not constitute a major Federal action significantly affecting the quality of the human environment, and we adopt that finding as our own. In an addendum to the survey, after the Minnesota Department of Natural Resources indicated an interest in acquiring the right-of-way, the staff recommended imposition of a condition allowing interested persons the first opportunity to acquire the property for a public use. We find that the properties subject to abandonment are suitable for other public purposes, and shall condition grant of abandonment accordingly. We shall modify the condition proposed in the addendum to require a holding open for 180 days, and, since the expressed interest was in nonrail use of the line, to permit removal of the rails and ties during the negotiation period.

We advise the parties that this decision is administratively final under the provisions of section 17(9) of the act. The Commission can entertain further administrative appeal only under section

17(9)(d), which permits such an appeal only if the entire Commission finds that a matter of general transportation importance is involved, that clear and convincing new evidence has been presented, or that changed circumstances exist which would materially affect the decision. Such appeal must be filed within 20 days of the date of service of this decision.

We find that, subject to the same conditions for protection of employees as set forth in *Oregon Short Line R. Co.—Abandonment Goshen*, 354 I.C.C. 584 (1978), the present and future public convenience and necessity permit abandonment by the Chicago and North Western Transportation Company of its described line of railroad extending between Marshall Junction and Vesta, MN, provided that the applicant shall not sell, lease, exchange, or otherwise dispose of the right-of-way underlying the track, nor remove any of the railroad structure, except rails and ties, for a period of 180 days following issuance of the certificate unless it has first offered the property, upon reasonable terms, to responsible persons interested in acquiring the property for public use.

It is ordered:

Any person or government entity considering an offer of financial assistance to enable continuance of the involved rail service should promptly give notice that it is considering such an offer by certified mail to carrier applicant and by first-class mail to all parties of record and the Commission.

The applicant railroad shall, within 10 days after receiving notice that an offer of financial assistance is being considered, make available to the party considering the offer the information described under the heading "Railroads Seeking Abandonment Authority," which appears in the attached notice of the Commission entitled "Procedures for Pending Rail Abandonment Cases," served March 31, 1976, and published on that date in the Federal Register, 41 F.R. 13691 (procedures). Such information shall be made available in the manner described in the procedures.

Upon this order becoming administratively final, notice of the finding of public convenience and necessity shall be published in the Federal Register pursuant to the requirements of section 1a(6)(a) of the Interstate Commerce Act, as amended.

Notwithstanding any notice of financial assistance given as outlined above, any person or government entity desiring to offer financial assistance to enable continuance of the rail service involved shall, within 15 days of publication in the Federal Register of the finding of public convenience and necessity, send notification of such offer by certified mail to the applicant railroad and the Commission and by first-class mail to all parties of record. Such notification shall include the terms and information described under the heading "Persons Offering Rail Service Assistance," which appears in the procedures.

If the Commission finds that a financially responsible person has offered financial assistance in accordance with the procedures, the Commission shall postpone the issuance of a certificate of abandonment for such reasonable time, not to exceed 6 months, as is necessary to enable such person or government entity to enter into a binding agreement with the applicant railroad to provide financial assistance for continued rail service or to purchase the rail line.

When the Commission is informed of the execution of any financial assistance agreement or acquisition and operating agreement, the issuance of the certificate of abandonment shall be postponed for such period of time as such an agreement (including any extensions or modifications) is in effect.

All correspondence to the Commission with respect to offers of financial assistance for the continued operations or acquisition of the line shall contain an appropriate reference to this proceeding. On the lower left-hand corner of envelopes containing such correspondence the following notation shall be typed in boldface: "AB-RSCP."

Subject to the conditions set forth above, an appropriate certificate of abandonment shall be issued. The applicant shall not effect any abandonment or discontinuance of service prior to the effective date of such certificate of abandonment.

This order shall be effective 30 days from the date of service.

By the Commission, Division 2, Commissioners Stafford, Gresham and Christian.

APPENDIX A

Projected revenue and cost data based on 41 round trip cycles

	192 carloads	Per car amount for variable items	775 carloads	1203 carloads
Revenues	97,754	509.14	394,584	612,495
Avoidable costs:				
Off-branch costs	56,563	294.60	228,315	354,404
On-branch costs:				
Maintenance-of-way and structures.	134,605	--------	134,605	134,605
Maintenance of equipment	3,871	--------	3,871	3,871
Transportation	28,202	--------	28,202	28,202
Fringe benefits	15,353	--------	15,353	15,353
Taxes	4,003	20.85	16,159	25,083
Rent income	(3,235)	--------	(3,235)	(3,235)
Rent costs	8,647	45.04	34,906	54,183
Total avoidable costs	248,009	--------	458,176	612,466
Gain (loss) from operations	(150,255)	--------	(63,592)	29

APPENDIX B

Projected revenue and cost data based on 65 round trip cycles

	192 carloads	Per car amount for variable items	775 carloads	1322 carloads
Revenues	97,754	509.14	394,584	673,083
Avoidable costs:				
Off-branch costs	56,563	294.60	228,315	389,461
On-branch cost:				
Maintenance-of-way and structures.	134,605	--------	134,605	134,605
Maintenance of equipment	6,111	--------	6,111	6,111
Transportation	42,144	--------	42,144	42,144
Fringe benefits	16,794	--------	16,794	16,794
Taxes	4,003	20.85	16,159	27,564
Rent income	(3,235)	--------	(3,235)	(3,235)
Rent costs	8,647	45.04	34,906	59,543
Total avoidable costs	265,632	--------	475,799	672,987
Gain (loss) from operations	(167,878)	--------	(81,215)	96

No. AB-126

WELLSVILLE, ADDISON & GALETON RAILROAD CORPORATION—ABANDONMENT OF ENTIRE LINE IN POTTER AND TIOGA COUNTIES, PENNSYLVANIA

Decided September 21, 1978

On petition for general transportation importance, imposition of employee protective conditions in entire line abandonments discussed, and conditions found unwarranted by the facts in this proceeding.

Fred H. Krones for applicant.

DECISION

BY THE COMMISSION:

The only issue in this proceeding is imposition of employee protective conditions in a decision authorizing the abandonment of an entire line of railroad.

In a report and order dated September 30, 1977, the Commission, Review Board Number 5, found that public convenience and necessity permitted abandonment of the entire line of the Wellsville, Addison & Galeton Railroad Corporation (WAG). The board stated that section 1a(4) of the Interstate Commerce Act (act) as amended by the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act) did not specifically apply to this proceeding. This section provides that:

> Each such certificate which is issued by the Commission shall contain provisions for the protection of the interests of employees. Such provisions shall be at least as beneficial to such interest as provisions established pursuant to section 5(2)(f) of this Act and pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565).[1]

It stated that the legislative history of the 4R Act indicated Congress did not intend to alter the instances in which employee protective conditions are imposed. The board then cited *Okmulgee*

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[1] The scope and content of the protection was outlined in *Oregon Short Line R. Co.—Abandonment—Goshen*, 354 I.C.C. 76 (1977), and *Oregon Short Line R. Co.—Abandonment—Goshen*, 354 I.C.C. 584 (1978).

Northern Ry. Co. Abandonment, 320 I.C.C. 637 (1964) for the proposition that the Commission has not imposed protective conditions in entire line abandonments, and held that since no special circumstances were shown in this proceeding, no protective conditions would be imposed.

The board's report and order was appealed. The appeal addressed itself to the decision to grant the abandonment application, not to the issue of employee protection. In a decision dated March 16, 1978, the Commission, Division 2, affirmed the review board's decision to permit the abandonment, however, it did so subject to the conditions for protection of employees set forth in *Oregon Short Line R. Co.—Abandonment—Goshen,* 354 I.C.C. 76. Division 2's decision is found in *Wellsville, Addison & Galeton R. Corp.—Abandonment,* 354 I.C.C. 247 (1978).

APPLICANT'S PETITION FOR GENERAL TRANSPORTATION IMPORTANCE

WAG's response to the division 2 decision was to file a pleading stating that the imposition of employee protection "invokes a matter of general transportation importance." WAG argues that historically the imposition of employee protective conditions had been limited to the abandonment of a *segment of* a larger system and such protection is inapplicable to abandonments of an entire short-line railroad. Since on appeal no specific arguments were addressed to the board's nonimposition of protective conditions, it was an error to reverse the board's findings on this issue, and WAG requests that this holding of division 2 be reversed.

DISCUSSION AND CONCLUSIONS

We believe that the issue of imposition of employee protective conditions in entire line abandonments is an issue of general transportation importance and we grant applicant's petition and reopen the proceeding. The review board's discussion of the inappropriateness of imposition of employee protective conditions was correct in all respects, and the imposition of those conditions for the protection of employees found in *Oregon Short Line* was inadvertent error.

The precise language of section 1a(4) of the act would appear to require imposition of employee protective conditions in all permitted abandonments. However, the legislative history of the 4R Act and prior Commission precedent is clearly to the contrary. In the Report of the Committee of Conference on the Railroad

Revitalization and Regulatory Reform Act of 1976, H. R. Report No. 94-781, p. 218-19, Congress indicated that the precise language of section 1a(4) was not intended to change the policy and practice of the Commission in connection with certificates involving total termination of service by a railroad company.

Prior Commission precedent in this area is well established. Employee protective conditions have not been imposed in cases involving complete abandonment of operations, because the Commission found it unwarranted to require futher consumption of a railroad's properties for the payment of employees after the railroad ceases operations. ***Okmulgee Northern Ry. Co. Abandonment,*** 320 I.C.C. 637 (1964). ***Tennessee Central Ry. Co. Abandonment,*** 333 I.C.C. 443, 454 (1968).

However, the Commission has imposed protective conditions where the applicant has a corporate parent that would benefit from the abandonment and who could be made responsible for the cost of labor protection attendant to an abandonment. see ***East Carolina Ry. Abandonment,*** 324 I.C.C. 506. WAG has no corporate parent that would benefit from the abandonment of the railroad. Its small and deficit producing boxcar leasing operations (discussed in the prior decision) are inadequate to justify imposition of employee protective conditions. The prior decision will be modified to remove all references to employee protection, specifically those conditions for protection of employees as set forth in ***Oregon Short Line R. Co.—Abandonment—Goshen,*** 354 I.C.C. 76 (1977).

It is ordered:

1. The petition for general transportation importance filed by applicant is granted.
2. This proceeding be reopened on its own record to discuss the issues raised by the petition.
3. The prior decision dated March 16, 1978, served April 5, 1978, and found in ***Wellsville, Addison & Galeton R. Corp.—Abandonment,*** 354 I.C.C. 247 (1978), is modified to eliminate imposition of the conditions for the protection of employees found in ***Oregon Short Line R. Co.—Abandonment—Goshen,*** 354 I.C.C. 76 (1977).

By the Commission, Chairman O'Neal, Vice Chairman Christian, Commissioners Brown, Stafford, Gresham, and Clapp.

FINANCE DOCKET NO. 28581

TERMINAL RAILWAY ALABAMA STATE DOCKS—OPERATION, MOBILE, AL

Decided September 22, 1978

1. Under section 1(18)(d), acquisition of track for connecting switching purposes at a terminal is exempt from Commission jurisdiction.
2. Section 5(2) is inapplicable to the acquisition of rail properties exempt under section 1(18) of the act.
3. In Finance Docket No. 28581, upon reconsideration, the decision of Review Board Number 5 approving the operations is vacated and the application is dismissed.

G. Sage Lyons and *Lester M. Bridgeman* for Terminal Railway Alabama State Docks.

John O'Brien Clarke, Jr., and *William G. Mahoney* for Railway Labor Executives' Association.

John W. Adams, Jr., for Illinois Central Gulf Railroad Company.

DECISION

BY THE DIVISION:

Terminal Railway Alabama State Docks (TRASD) applied for authority to operate certain rail yard properties formerly owned by the Illinois Central Gulf Railroad (ICG).[1] At the same time TRASD filed a petition to dismiss the application contending that under section 1(18)(d) of the Interstate Commerce Act the operation of switching track is exempt from Commission jurisdiction. In a decision served March 10, 1978, Review Board No. 5 granted the application after finding the yards were to be used as terminal facilities not exempted from Commission jurisdiction.

By petition filed March 24, 1978, the Railway Labor Executives' Association (RLEA) seeks review of the decision.[2] RLEA seeks specific protection for the ICG employees who may be affected by the change in operations of the facilities. TRASD late-filed a petition on April 7, 1978, seeking review on the jurisdiction issue. At the time it filed a motion (incorporating the previously noted pleading) to strike RLEA's petition or, in the alternative, reply to it. ICG petitioned for leave to intervene to accept employee protective conditions to protected employees directly affected by the transaction and RLEA replied.

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[1] The yard properties involved are known as Choctaw Point and the Frascati Yard. They are located at the Mobile dock area, entirely within the city of Mobile, AL.

[2] RLEA also requested a stay order and the Commission, in a decision served March 31, 1978, ordered TRASD to cease and desist from exercising the authority granted. Upon appeal from this decision by TRASD, the Commission, by decision served April 18, 1978, vacated the cease and desist order but provided ICG an opportunity to intervene and prohibited it from taking any action which would impact on employees who might be affected by the transaction until after the RLEA appeal was decided.

PROCEDURAL MATTERS

RLEA has moved to strike TRASD's petition for reconsideration on the ground that it was late-filed. Section 17(9)(c) of the act and rule 98(c) of the Rules of Practice establish a 20-day time limit for appeals to be filed after service of a decision. TRASD's petition for reconsideration was 8 days late. TRASD has requested however that the petition, if considered late-filed, be treated as part of its reply to RLEA's petition. As the two simultaneously filed pleadings are clearly interrelated, we will deny RLEA's motion to strike and treat the petition as part of the motion to strike/reply.

We will also deny TRASD's motion to strike the RLEA petition. TRASD contends that RLEA is not a proper party to this proceeding. RLEA's letter protest of December 1, 1977, was not served upon the parties as required by rule 1100.38 of the Rules of Practice. However, as TRASD has fully responded to RLEA's appeal it does not appear to have been prejudiced by lack of notice.[3]

DISCUSSION AND CONCLUSIONS

The central issue on appeal is whether the acquisition and operation of the yard facilities by TRASD are subject to either section 5(2) or section 1(18). RLEA contends that the acquisition is a purchase which must be approved under section 5 subject to customary employee protective conditions. We find that the acquisition involves track exempt under section 1(18), and accordingly is also exempt under section 5(2).

SECTION 1(18)

Section 1(18) provides in part:

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[3] RLEA also argues that section 17(12) of the act gives it an absolute right to particiate in this proceeding. Section 17(12) permits employee representatives to intervene in any proceeding arising under the act which may affect employees. As we find that the involved transaction is beyond our jurisdiction, we make no determination here on this issue.

> *** no carrier by railroad subject to this part *** shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require the *** operation *** of such additional or extended line of railroad ***.

Section 1(18)(d) contains exemptions to this requirement. It provides in part:

> The authority granted to the Commission under this paragraph shall not extend to the construction, acquisition, or operation of spur, industrial, team, switching, or side tracks if such tracks are located or intended to be located entirely within one State.

In its application TRASD stated that the purchased track would be used "as a switching yard and to furnish connection terminal switching between points of connection with the Illinois Central Gulf Railroad and the Louisville and Nashville Railroad and sidings of industries presently being served by the ICG." In its petition for dismissal, TRASD contended the acquisition was exempt under section 1(18)(d) because the involved track will be used for switching. The review board concluded that the facilities will be used for nonexempt terminal purposes, rather than as exempted switching facilities. We disagree. Connection terminal switching is a class of switching service which is performed at origin and destination terminals by carriers.[4] Under section 1(18)(d) track to be used for "connection terminal switching," like other switching track may be acquired without Commission approval provided the impact of the acquisition will be—as it is here—entirely local. TRASD's petition to dismiss the application should have been granted because the trackage is exempt under section 1(18) and the acquisition thereof is also exempt from section 5(2) as discussed below.

SECTION 5(2)

RLEA has raised the argument that section 5(2) could apply to this transaction. Section 5(2)(a) rests jurisdiction in the Commission to authorize:

> *** any carrier, or two or more carriers jointly, to purchase *** the properties or part thereof, of another carrier.

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[4] See *Sioux City Term. Ry. Switching*, 241 I.C.C. 53, 90 (1940), which defines various classes of switching and their element.

RLEA argues that if section 5(2) as opposed to section 1(18) applies, the proposed transaction is clearly subject to Commission jurisdiction. According to RLEA, the only exemption under section 5(2) for a track acquisition involves *joint* use or operation of certain types of trackage and that no such operation is involved here.

Based on an analysis of congressional intent, the Commission has previously indicated section 5(2) is the appropriate provision for dealing with the unification of two or more regulated railroad enterprises as in the case of consolidation or merger.[5] Section 5(2) is not designed to deal with acquisitions of certain kinds of trackage when just the extension of one carrier operations rather than the consolidation of two regulated carrier operations is involved. Section 1(18) is the applicable section in these situations.[6]

This transaction does not involve the consolidation of regulated transportation facilities envisioned by section 5(2) and the public interest analysis that is associated with it. Nor does it involve the extension of *one* carrier's regulated transportation activities cognizable under section 1(18). All that is involved is the transfer of rail yards from one carrier to another without any change in operations involving Commission jurisdiction. To require approval of the transfer of these properties under either section 5(2) or 1(18) would be anomalous.[7] No such anomaly is required under Commission precedent.

Having found the acquisition of the involved yards tracks to lie beyond our jurisdiction, there is no basis for the imposition of labor protective conditions. ICG's petition to intervene must accordinly be dismissed as moot.

This decision does not significantly affect the quality of the human environment.

It is ordered:

1. Terminal Railway Alabama State Docks' motion filed April 7, 1978, to strike the petition for administrative review of the Railway Labor Executives' Association is denied.

2. The Railway Labor Executives' Association's motion filed April 27, 1978, to strike applicant's petition for administrative review is denied.

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[5] *Praire Trunk Railway—Acquisition and Operation*, 348 I.C.C. 832, 850 (1977); *Tennessee Central Ry. Co. Abandonment*, 334 I.C.C. 235, 245 (1969); *Okmulgee Northern Ry. Co. Abandonment*, 320 I.C.C. 637, 639-640 (1964).

[6] See *Prairie Trunk Railway—Acquisition and Operation*, 348 I.C.C. 832, 851 (1977).

[7] Abandonment of switching track is also exempt from Commission jurisdiction. Section 1a(1) as amended.

3. The decision of the Commission, Review Board No. 5 served March 10, 1978, authorizing operations by TRASD is vacated and set aside.

4. Terminal Railway Alabama State Docks' motion to dismiss the application is granted.

5. The Railway Labor Executives' Association's petition for administrative review is denied.

6. The Illinois Central Gulf Railroad's petition to intervene in this proceeding is dismissed.

7. Ordering paragraph number 2 of the decision of the Commission, Edward J. Schack, Acting Director, Office of Proceedings, served April 18, 1978, is vacated and set aside.

8. This decision will be effective 20 days from the date it is served.

By the Commission, Division 1, Acting as an Appellate Division, Commissioners Brown, Gresham, and Clapp.

No. AB-12 (Sub-No. 25)

SOUTHERN PACIFIC TRANSPORTATION COMPANY—ABANDONMENT BETWEEN HAZEN AND FALLON IN CHURCHILL COUNTY, NEVADA

Decided January 27, 1978

Application of Southern Pacific Transportation Company for abandonment of a line between Hazen and Fallon, Churchill County, Nev., denied.

Report and Order

On August 8, 1977, applicant Southern Pacific Transportation Company (SP), filed exceptions to the initial decision of the Administrative Law Judge in this proceeding, served July 18, 1977, which recommended denial of the abandonment application. On September 8, 1977, a joint reply was late-filed on behalf of all protestants.

While we agree with the ultimate conclusions of the Administrative Law Judge, we differ with some of his reasons and feel that additional discussion would be helpful.

Exceptions and Reply

SP alleges a number of prejudicial errors in the initial decision. First, it contends that the allocation of rehabilitation expenses over a 25-year period, in the manner of a return on capital investment, fails to recognize the substantial and immediate expenses that will be incurred by SP. Applicant cites the Commission's Uniform System of Accounts for Railroad Companies (49 CFR 1200-1299) which requires that expenditures for rehabilitation be expensed rather than capitalized. SP further refers to the regulations (49 CFR 1121.1-1121.5) which govern this proceeding, since the application was filed prior to November 1, 1976.[1] These regulations do not require any allocation of rehabilitation expenses. Thus, SP states that it would have been justified in showing rehabilitation expenses as one lump sum figure, rather than allocating it over a 5-year period. It had expensed the rehabilitation program over a 5-year period in its calculations simply to reflect the fact that the program would not be completed within 1 year but would be scheduled over such a 5-year period.

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[1] By order dated October 29, 1976, the Commission adopted new regulations, effective November 1, 1976, governing the abandonment of railroad lines and the discontinuance of rail service. This order in Ex Parte No. 274 (Sub-No. 2), Abandonment of Railroad Lines and Discontinuance of Service, amends part 1121 of Title 49 of the Code of Federal Regulations.

SP emphasizes the necessity for deferral of maintenance on low-density lines to permit the continuation of operations in an economic manner. It argues that it is not in the public interest to require large rehabilitative expenditures when there is little or no chance of recouping those expenses.

Secondly, SP charges that the Administrative Law Judge failed to recognize the undue economic burden of continued operations over the line. It contends that the burden outweighs any public convenience and necessity for the service when the line cannot generate sufficient revenues to meet the expenses of operation. It is irrelevant that the railroad system as a whole is profitable, SP maintains.

Thirdly, SP asserts that the Administrative Law Judge incorrectly concluded that there is a public need for continued operation over the line. It charges that the Administrative Law Judge erred in assigning the Hazen traffic of The Standard Slag Company (Standard Slag), to the 1976 cost and revenue computations of the Fallon branch line; the railroad acted responsibly in making full disclosure to this shipper and recommending alternate loading arrangements. It was also error to assign to the Fallon branch the 1976 less-than-carload (LCL), traffic of Fallon receivers unloaded at Hazen, according to SP this traffic could have been delivered to Fallon if the consignees had paid separately for that movement.

SP argues that, irrespective of solicitation, a lack of use of the line indicates a lack of need for the line. When there has been a proven decline or lack of traffic prior to the abandonment application, there can be little merit in claims that the pending application has inhibited traffic, it adds. To suggest that twice weekly service would increase the traffic on the line ignores the fact that the traffic had been declining before the service was reduced to 1 day per week, it states.

SP charges that the testimony of existing users, regarding anticipated future increased traffic, was merely speculative. Even if mineral resources in the area were to be tapped, there is no assurance that processing plants or rail loading facilities would be located in Fallon, it argues. SP also objects to references to the Naval Air Station in Fallon, since the Navy did not protest the abandonment and had indicated that present truck service was acceptable.

The fourth objection is to the finding that there would be a serious adverse impact upon the shippers, the locality, and the Nation if the abandonment were authorized. Alternate truck service would be available, SP claims. The railroad also suggests (apparently for the first time in this proceeding) that the Hazen facilities could be upgraded to meet shippers' needs.

Finally, SP raises two other objections with respect to the calculations used by the Administrative Law Judge. It objects to the reduction in the rate of return figure from the 15.84-percent pre-tax cost of capital presented by SP to the industry's average return of 8 percent. It also disputes the finding that there is only $30 of additional labor costs associated with the 30-mile roundtrip on the line.

In reply, protestants argue the appropriateness of the findings and conclusions of the Administrative Law Judge. These arguments need not be set forth at this point, but have been considered.

DISCUSSION AND CONCLUSIONS

As applicant maintains, rehabilitation expenditures should be expensed under the Commission's Uniform System of Accounts and in accordance with the regulations governing evidence to be presented in abandonment proceedings. The Administrative Law Judge erred in amortizing these expenditures over a 25-year period in calculating the costs of operations over this line. Had the Administrative Law Judge properly reflected the rehabilitation expenditures as expenses to be charged against income over the 5-year period in which the program of rehabilitation would be accomplished, he would have found that 1976 operations over the line were conducted at a loss.[2]

However, we do not agree with applicant's contention that the burden to the applicants and interstate commerce automatically outweighs any public convenience and necessity and that the line must be allowed to be abandoned if it does not pay for itself. There may be other overriding considerations militating against abandonment approval. Here there are two such considerations focused on by the Administrative Law Judge—evidence of deliberate downgrading of service by the railroad and evidence of anticipated substantial increases in traffic.

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[2] Even when the Hazen traffic of Fallon users is attributed to the branch line, the operations are still found to have been conducted at a loss.

Downgrading is a concept that must be separately tested within the context of each case. We must make often difficult judgments distinguishing reasonable measures of economy, designed to maintain service over low-density, marginally profitable lines, from actions deliberately intended to discourage traffic. Here the evidence indicates that applicant has crossed that line. It appears that, once the railroad noticed a significant trend of traffic decline and began considering the line as a candidate for abandonment, it curtailed service in such a manner as to actively discourage existing as well as potential traffic.

There are several indications of efforts by SP to discourage traffic from moving over this line. One is its action in flagging out of longstanding stopoff privileges, so that LCL shipments (other than the last shipment on the car) are delivered at Hazen and can no longer be received at Fallon for a modest charge. Discontinuance of this privilege, that the users had come to rely upon, would appear to be discriminatory, particularly if retained on other lines.

A second, more disturbing indication is the allegation by two witnesses that, shortly before the hearing in this proceeding, the railroad refused to serve their full carload traffic (transcript, pp. 497 and 529). A third indication is the scheduling of regular service on the line. Although the railroad may have been justified in reducing service to 1 day per week, given the traffic levels, it should not have scheduled that service for Saturday, when some of the users are not open for business.[4]

When requested by Standard Slag to construct a switch and spur at Fallon, SP acted reasonably in fully disclosing its intention to seek abandonment of the line. However, it apparently failed to consider that Hazen was not a satisfactory alternate loading point for the shipper, who has nevertheless invested over $20,000 in the installation of loading facilities at Hazen. There was no apparent reassessment by the railroad of the wisdom of abandoning the line in light of the prospective Standard Slag traffic and the known inquiries of other potential users considering locating on the line. Having determined to seek abandonment, the railroad was no longer able to objectively assess the future potential of this branch line.

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[4] The service was rescheduled for Fridays, 11 months later.

It is in the context of this evidence of deliberate downgrading that the Hazen traffic of Fallon users was attributed to the branch line. Standard Slag had requested a switch for a spur at Fallon, and the remaining shipments were ones that would have moved over the line prior to the discontinuance of stopoff privileges. We find that it was appropriate to include this traffic in judging the extent to which the line should be considered a burden to the railroad.

The issue of anticipated future increases in traffic is tied to that of downgrading, because without a commitment on the part of the railroad to provide reasonable service on the line, much of this traffic cannot materialize. This point is illustrated by the experience of Standard Slag, currently the largest rail user in Fallon. As protestants point out, the applicant's own estimates of traffic on the line the year after denial of the abandonment application is four times greater than the 1976 traffic figures; thus, SP cannot base the future traffic potential on the present traffic levels.

Judgments are necessarily involved in determining whether traffic is sufficiently foreseeable to be considered in measuring the public need for a line proposed for abandonment. Therefore, we hesitate to examine too critically the determinations made by the Administrative Law Judge. To be considered, there need not be an existing contract for the traffic; prospects less definite than that can be considered, if realistic. A certain amount of discretion is involved in making these determinations. We are acutely aware that abandonment of a line is normally an irreversible action. Thus, while a line should not be required to be maintained on the basis of mere speculation, reasonable traffic projections should receive careful attention. With these considerations in mind, we turn to a brief examination of the forecasted traffic of existing users and the likelihood of rail dependent economic development on the line.

With respect to Standard Slag, the fact that it could have had a contract in 1977 with Southern Clay for the shipment of 10,000 to 20,000 additional tons of mud grade barite (but turned it down because of the lack of rail service at Fallon) is sufficient evidence that its forecasts are realistic (transcript, p. 402).

Kennemetal, Inc., is a large corporation with a substantial investment in its two existing Fallon plants. Its plans for locating a large chemical plant in Fallon, which would double its rail usage, were not merely speculative.

SP would dismiss the traffic projections of Bill Janess Chevrolet because they are based on an assumption that the business would be expanded into two new programs in which it is not currently involved. We don not find that assùmption to be unwarranted. With respect to the "storage-type operation" for case tractors, Mr. Janess testified that he "had a deal" (transcript, p. 482). As for the Chevrolet heavy-duty truck franchise, the dealer's application had been under consideration by Chevrolet for 2 years without having been rejected or the franchise having been awarded to another Nevada dealership.

R. E. Montgomery & Son (Montgomery), is a new company, but one that attaches importance to rail service. SP does not offer any reason why Montgomery's rail usage projections should be viewed as mere optimism. By the time of the hearing, Montgomery had already requested inbound rail service and been refused delivery in Fallon (transcript, p. 529).

Rather than assisting the companies mentioned, SP has consistently discouraged or ignored their efforts to build a stronger traffic base on the line. The railroad has also failed to give consideration to the opportunities for gaining new rail users on the line. It was aware of the plans of Linde Products Company to locate in Fallon in order to have rail access. It also knew of the efforts of Mr. Weeks to open a heavy machinery business there. Mr. Weeks executed real estate contracts and secured the necessary rezoning before cancelling his plans as a result of the proposed abandonment. We believe that the railroad should have reexamined its plans to pursue abandonment in light of these developments. Instead, it assumed a posture of imminent abandonment which served as a strong deterrent to any potential increased traffic.

The evidence of future mining operations should not be disregarded. The record contains reliable evidence of substantial deposits of diatomaceous earth in the Fallon area. This is a commodity in great demand and the testimony indicates that three large mining concerns have expressed a serious interest in developing this resource (transcript, p. 636). None would proceed without a commitment from the railroad of continued service over this line. However, if a diatomaceous earth plant were opened, the profitability of the line would be assured irrespective of any other traffic.

We do not concur in all of the findings of the Administrative Law Judge. For example, we find that a presumption of need by the Naval Air Station is inappropriate. Nevertheless, there is sufficient evidence of future increased traffic upon which to base a finding of public need for the rail service. Although the carrier may experience temporary losses on the line at this time, it should be able to recoup those losses in future years when the traffic increases have been achieved. It should be remembered that, upon completion of the rehabilitation program, normalized maintenance expenses will be considerably lower; thus, the amount of revenues needed to sustain the line (in 1976 dollars) will be less than that currently indicated.

It is clear on the record that the proposed abandonment would have the adverse impacts stated in the initial decision. Many of the rail using businesses in Fallon do not consider Hazen as a viable alternate rail head and would be adversely affected by the proposed abandonment. Standard Slag, for example, experiences both losses and environmental pollution from the fugitive dust created in double-loading its product (onto trucks at Fallon and then rail cars at Hazen). It complains that there is not sufficient water available in Hazen to adequately wet down its stock pile there to minimize dust on windy days. Standard Slag has already refused one contract because of the lack of service to Fallon. It testified that if the Fallon line is abandoned, upon completion of its current commitments it would either shut down altogether or relocate in the Austin-Battle Mountain area (transcript, p. 409).

Although Kennemetal, Inc., can utilize motor carrier transportation, Bill Janess Chevrolet does not have that option for its planned truck and tractor operations. It would be prevented from carrying these commodities. Montgomery could utilize motor carriers, but the volume of business it could handle would be limited significantly as a result. Other businesses with a lesser volume of rail usage would also be substantially impacted by the proposed abandonment. Bradley's Garage, which sells and services farm equipment, would not be able to receive large machines. Kent's Supply Center would have to discontinue its coal dealership. Local feed and grain using industries claim they would suffer from no longer being able to receive certain midwestern products at competitive rates.

Abandonment of the branch line would have a substantial adverse impact upon the economic development of the Fallon community. It could lose some of its existing employers, such as Standard Slag, and would not be able to benefit from the anticipated growth of others, such as Kennemetal, Inc. The town will not be able to attract industries that it would otherwise acquire; examples are Linde Products Company, the heavy machinery business of Mr. Weeks, and a diatomaceous earth mining outfit. The Nation would also lose this potentially valuable transportation resource.

For the foregoing reasons, *we find* that the evidence considered in the light of the pleadings does not warrant a result different from that reached by the Administrative Law Judge and that the abandonment application should be denied. This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered, the application is denied.

By the Commission, Division 1, Commissioners Brown, Gresham, and Christian (Commissioner Gresham not participating).

FINANCE DOCKET NO. 28799F[1]

SOUTHERN PACIFIC TRANSPORTATION COMPANY—PURCHASE (PORTION)—CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

Decided November 6, 1978

Petition for waiver of ICC Railroad Acquisition, Control, Merger, Consolidation, Coordination Project, Trackage Rights, and Lease Procedures, 49 CFR 1111, granted.

Charles W. Brukett, Carol A. Harris and *Herbert A. Waterman* for Southern Pacific Transportation Company.

Martin L. Cassell for Chicago, Rock Island and Pacific Railroad Company.

Nicholas G. Manos for William M. Gibbons, trustee of the property of Chicago, Rock Island and Pacific Railroad Company.

DECISION

BY THE COMMISSION

Southern Pacific Transportation Company (SP), and Chicago, Rock Island and Pacific Railroad Company (RI) filed a supplemental petition on September 29, 1978, pursuant to 49 CFR 1100.99 of the ICC Revised Rules of Practice (Rules of Practice), seeking waiver of the requirements of section 1111.2(b)(1)(ii) and clarification of section 1111.2(a)(8) of the ICC Railroad Acquisition, Control, Merger, Consolidation, Coordination Project, Trackage Rights and Lease Procedures (*Consolidation Procedures*).

In a prior petition, SP and RI sought broad waiver of other requirements of the *Consolidation Procedures.* Petitioners were denied this waiver in Finance Docket No. 28799, *Southern Pacific Transportation Company—Purchase (Portion)—Chicago, Rock Island And Pacific Railroad Company,* decided August 16, 1978.

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[1] A copy of this decision will be filed in Ex Parte No. 282 (Sub-No. 1), *Railroad Consolidation Procedures.*

INFORMATION REQUIRED FOR THE EXHIBIT A-13, TABLE B

Section 1111.2(b)(1)(ii) of the *Consolidation Procedures* requires that applicants submit certain revenue carload interchange data in exhibit A-13. As a separate table of exhibit B applicants must show for each connecting line-haul carrier at each major interchange point (5,000 or more revenue carloads during the latest calendar year) the annual carloads handled between each origin-destination State pair. Petitioners estimate that this material would comprise 750 pages and would be included in its entirety in every copy of the application.

For every interchange there are 48 possible origin-destination State combinations. Many of these pairs involve less than 100 revenue carloads per year, and would account for only a very small percent of the traffic flow in a transaction of this size according to the petitioners. Granting the requested waiver for State pairs of less than 100 carloads annually would reduce the size of the required table from 750 to less than 200 pages and would reduce petitioners' time and cost of distributing the contemplated application.

In *Burlington Northern, Inc.—Control & Merger—St. L.*, 354 I.C.C. 182, 187-8 (1977), we granted a similar request, and do so in this proceeding. Petitioners have presented sound reasons for waiving the requiements of table B of exhbit 13 for movements of less than 100 cars per year. The scope of the proposed transaction is sizable and it is our opinion that the requirements of section 1111.2(b)(ii) for State pairs of less than 100 carloads annually would not yield information that would aid the Commission or other parties in evaluating the proposed transaction.

The full requirements of section 1111.2(b)(ii) may still have relevance to smaller consolidation proposals, and therefore we will not amend the *Consolidation Procedures.*

THE MAP—SECTION 1111.2(a)(8)

Petitioners request clarification of the requirements of 49 CFR 1111.2(a)(8):

> a general or key map indicating clearly, in separate colors, or otherwise, on a suitable scale, preferably not smaller than 20 miles to the inch, the lines or lines of applicant, parts of the line or lines of each applicant in their true relation to each other, short-line connections, other rail lines in the territory, and the principal geographic points of the region traversed. Whenever possible, this map should not be over 30 inches in its largest dimension.

They believe that a map on this scale would not aid the Commission or parties in evaluating the transaction. They argue that **though detail may be necessary in situations where the consolidations are small or overlapping, it would be of little use** in a large scale end-to-end consolidation such as petitioners' proposed transaction.

Petitioners propose to submit a map drawn to a scale of 100 miles to the inch. The existing systems of SP, St. Louis Southern Western Railway Co. and RI would be designated in different colors. Routes of the principal competing carriers would be shown. The transaction here involves an extension of line in excess of 900 miles, and we see no reason for the detail that is required in section 1111.2(a)(8). Since this section does not make 20 miles to an inch a requirement, but rather a preferable minimum, no formal waiver is required. Smaller transactions will, however, require more detailed maps to allow accurate evaluation.

To notify the public, this decision will be published in the Federal Register.

We find that this decision does not significantly affect the quality of the human environment.

It is ordered:

(1) Petitioners supplemental request for waiver 49 CFR 1111.2(b)(1)(ii) is granted. (2) Public notice of our action shall be given to the general public by delivery of a copy of this decision to the Director, Federal Register, for publication. (3) This decision shall be effective on the date it is served.

By the Commission, Chairman O'Neal, Vice Chairman Christian, Commissioners Brown, Stafford, Gresham, and Clapp.

FINANCE DOCKET NO. 27773[1]

MISSOURI PACIFIC RAILROAD COMPANY—MERGER—THE TEXAS PACIFIC RAILWAY COMPANY AND CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

Decided November 13, 1978

This decision closes these proceedings (they had been reopened in accordance with a Court of Appeals' judgment). The Court of Appeals' decision is construed to stand for the principle that the Commission may nullify only State law restraints that are materially related to a proposed merger or consolidation within the Commission's jurisdiction.

William A. Brasher for applicants.
James D. Smullen and *Byron A. Thomas* for protestants.

DECISION

By a decision served May 9, 1978, we reopened these proceedings in accordance with the judgment of the United States Court of Appeals for the Fifth Circuit in *City of Palestine* v. *United States*, 559 F. 2d 408, which affirmed the Commission's order except insofar as it relieved the Missouri Pacific Railroad Company (MoPac) of its obligations under the Palestine Agreement. The Supreme Court denied MoPac's petition for a writ of certiorari on April 3, 1978.

Our May 9 decision invited the parties to submit their views concerning what further action the Commission should take to comply with the Court of Appeals' judgment. The city of Palestine and Anderson County, TX, state that in their view no further action is required or warranted. They argue that the Court of Appeals simply reversed the Commission's order insofar as it relieved MoPac of its obligations under the Palestine Agreement, that the merger was carried out in the fall of 1976, and that "there is nothing further before the Commission."

MoPac agrees that no further action is required or warranted.

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[1] This decision also embraces Finance Docket No. 27774, Missouri Pacific Railroad Company—Securities.

We agree with the parties. The court's judgment, which in effect set aside that portion of the Commission's order that abrogated the Palestine Agreement, is self executing. Accordingly, we will close the proceedings.

While we enter no further decision except to close the proceedings, we wish to make clear our understanding of the Court of Appeals' opinion. In its petition for a writ of certiorari, MoPac stated that, under the holding of the Court of Appeals, "the Commission is limited by §5(11)[2] and may nullify state law constraints only where the restraints would stand in the way of or absolutely prohibit a proposed consolidation" (page 13). If we had read the court's decision that way, we too would have asked the Supreme Court to review the decision, because it would have significantly frustrated the congressional policy of encouraging rail consolidations that serve the public interest. In our view, however, the decision stands for the narrower principle that the Commission may nullify only State law restraints that are materially related to a proposed merger or consolidation within the Commission's jurisdiction.

We found in our earlier decision in these proceedings that the Palestine Agreement was significantly related to MoPac's corporate simplification merger, because it would preclude MoPac from taking full advantage of the opportunities for savings made possible by the merger. The Court of Appeals substituted its judgment for the Commission's on this question and found that the agreement was not related to the merger. Although we disagreed with the court's decision, we did not file our own petition for a writ of certiorari, because we did not believe that this essentially factual difference warranted review by the Supreme Court. Our view of the Court of Appeals' decision is accurately set forth in the "Memorandum for the Federal Respondents" filed in the Supreme Court by our General Counsel and the Solicitor General. The text of the memorandum is appended to this decision.

While we do not agree with the result reached by the Court of Appeals, we of course accept its decision as the final judgment in this matter. We intend to interpret its opinion in the future in accordance with the understanding expressed in this decision and in the appended Supreme Court pleading.

Chairman O'Neal, concurring in part:

I agree that the proceeding should be closed. But I do not concur in the language used by the majority in construing the Court of

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[2] Now section 5(12) of the Interstate Commerce Act.

Appeals decisions. Different interpretations may be made of the court's language, and while the majority's interpretation may be reasonable, other, equally rational interpretations could be made.

The important issue is not the Commission's reading of the court's opinion, but rather its interpretation of section 5(12) (formerly section 5(11) of the act). The Commission's construction of its powers under the statute in this proceeding was far too broad, and its decision was properly reversed. In exercising its authority under this section in the future, the Commission should apply a "substantial burden" test, to take jurisdiction in situations where the operation of a State law might not actually stop a section (5) transaction but where it might substantially impair or reduce the benefits to the public interest resulting from the transaction. If the State law does not impose such a burden, the Commission should not seek to abrogate it.

It is ordered:

These proceedings are closed. This order shall be effective on the date of service.

By the Commission, Chairman O'Neal, Vice Chairman Christian, Commissioners Brown, Stafford, Gresham, and Clapp. Chairman O'Neal concurring in part.

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-870

MISSOURI PACIFIC RAILROAD COMPANY, PETITIONER

v.

CITY OF PALESTINE, TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

This case involves the validity of an order of the Interstate Commerce Commission. The order, issued under Section 5 of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U.S.C. 5, approved a rail merger proposal and nullified certain state laws and contractual restraints that would have unduly burdened the unified rail operation.

1. In 1974 petitioner and its principal subsidiaries—Texas and Pacific Railway Co. (T&P) and Chicago & Eastern Illinois Railroad Co. (C&EI)—filed a joint application under Section 5(2) of the Act to merge the properties and franchises of T&P and C&EI into petitioner. Petitioner, T&P, and C&EI already operated a united system; the proposed merger was "merely a 'corporate simplification' designed to bring two near-wholly owned subsidiaries under the banner of the parent company" (Pet. App. 13).

In connection with their application, the railroads asked that petitioner be relieved of its obligations under the "Palestine Agreement." Its early history is recounted in *International & Great Northern Ry. v. Anderson County*, 246 U.S. 424. The International and Great Northern Ry. was required, under a contract reinforced by a state law, to keep its headquarters in Palestine, Texas (Pet. App. 34-39). After petitioner acquired the Great Northern, petitioner became insolvent. Petitioner explored the possibility of rearranging its corporate structure as part of its reorganization effort, so that it would emerge from reorganization as a unified company. The reorganization court, however, was powerless to nullify Great Northern's obligation, by then embodied in a judicial decree, to maintain its corporate headquarters in Palestine (Pet. App. 8-9). The courts suggested that petitioner seek a modification of the judicial decree.

In 1954 petitioner entered into negotiations with the City of Palestine to obtain a modification of the decree. The parties later executed the Palestine Agreement. The Agreement ended the Great Northern's obligation to maintain its general headquarters in Palestine; petitioner agreed, in exchange, to maintain 4.5 percent of its employees in certain job classifications in Palestine (Pet. App. 9, 40-41). The judicial decree was modified in accordance with the agreement, and petitioner and Great Northern were consolidated.

The present case arises out of petitioner's effort to eliminate its obligations under the Palestine Agreement. The City of Palestine and Anderson County objected to petitioner's request that the Commission abrogate the Palestine Agreement under Sections 5(2) and 5(11) (now 5(12)) of the Act as part of the Commission's approval of the merger of T&P and C&EI into petitioner.[1]

The Commission found that the Palestine Agreement imposes "undue burdens and obligation on [petitioner] and *** will impose unduly burdensome, inefficient, [in]juriously wasteful, and unnecessary obligations on the proposed unified operations and upon interstate commerce" (Pet. App. 31). It concluded that "the Commission has the authority under section 5(11) of the act to relieve [petitioner] of these requirements, and that [petitioner] should be relieved of its obligations thereunder" (*ibid.*).

The court of appeals affirmed the Commission's order except insofar as the order relieved petitioner of its obligations under the Palestine Agreement (559 F. 2d 408; Pet. App. 4-24). The court agreed with the Commission that the Palestine Agreement would unduly burden petitioner's unified system and interstate commerce (Pet. App. 14-15). It held, however, that this is not sufficient to trigger the Commission's power under Section 5(2) and (11) to set aside petitioner's obligations (*id.* at 12):

> [W]e conclude that the ICC's power only extends to setting aside state restraints to the effectuation of an approved section 5(2) transaction and no further. Although the Palestine Agreement may burden [petitioner], the agreement clearly is not an obstacle to the merger of T&P and C&EI and does not threaten the merger's success. The ICC exceeds the scope of its authority when it voids contracts that are not germane to the success of the approved section 5(2) transaction.

Although the Commission had found the annulment of the Palestine Agreement to be related to the central objectives of the proposed merger—*i.e.*, to streamline rail operations and to enhance operational flexibility—the court disagreed. It stated (*id.* at 13): "Despite the irrelevance of the Palestine Agreement to the merger, the ICC has gratuitously relieved [petitioner] of its contractual obligations."

2. Petitioner asserts (Pet. 13) that, under the court of appeals' holding, "the Commission is limited by §5(11) and may nullify state law restraints only where the restraints would stand in the way of or absolutely prohibit a proposed consolidation." If that is the correct characterization of the court's holding, then it would be contrary

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[1] Section 5(2) providies that it shall be lawful, with the Commission's approval, "for two or more carriers to consolidate or merge their properties or franchises *** into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership ***." Section 5(12) provides that carriers participating in a transaction approved under Section 5 "are relieved from the operation of *** all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved ***."

to *Texas* v. *United States*, 292 U.S. 522; *Seaboard Air Line R.R.* v. *Daniel*, 333 U.S. 118; and *Schwabacher* v. *United States*, 334 U.S. 182, and would significantly frustrate the congressional policy of encouraging rail consolidations in the public interest.[2] But we do not read the court's decision so broadly. Although the opinion includes language that may lend support to petitioner's reading of the decision, the language is dicta at best. We believe that the decision stands only for the principle that the Commission may not nullify state law restraints that are not materially related to a proposed merger or consolidation within the Commission's jurisdiction. The court set aside the Commission's decision here only because it thought that the Palestine Agreement is irrelevant to the merger (Pet. App. 13).

We agree with petitioner that the court of appeals erred in finding, contrary to the Commission's determination, that the Palestine Agreement is unrelated to petitioner's corporate simplification merger. The Commission found that the Palestine Agreement's requirements will preclude petitioner from taking full advantage of the opportunities for savings made possible by the merger, and the Agreement thus frustrates the transaction that the Commission properly approved. The court of appeals should not have substituted its own judgment on this question for that of the Commission. See, *e.g., Ralston Purina Co.* v. *Louisville & Nashville R.R.*, 426 U.S. 476. But because, in our view, the court of appeals' decision rests more on factual disagreement with the Commission than on any legal disagreement, the United States and the Commission did not file a petition for a writ of certiorari. Moreover, in the Commission's view, circumstances like those presented by this case are not likely to recur, because the Commission rarely exercises its nullification authority under Section 5(11) to upset agreements similar to this one.

Because the court of appeals erroneously set aside the Commission's factual determination, however, we will support the Commission's order if the petition is granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MARK L. EVANS,
General Counsel,
Interstate Commerce Commission.

March 1978.

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[2] Cf. *First Lincolnwood Corp.* v. *Board of Governors*, 560 F. 2d 258 (C.A. 7) (*en banc*), which held that the Federal Reserve System may not disapprove the formation of a new bank holding company, even if its financial structure would be unsound, unless the reorganization would make financial conditions deteriorate. This Court has granted the Board's petition for certiorari (No. 77-832, granted February 21, 1978), which argued that the Board need not find that a particular condition will be aggravated by the change of corporate structure before it may order that condition corrected.

FINANCE DOCKET NO. 28533

MINNESOTA TRANSFER RAILWAY COMPANY ORDERED TO PROVIDE SERVICES, TRACKS, AND FACILITIES FOR THE OPERATIONS OF TRAINS OF THE NATIONAL RAILROAD PASSENGER CORPORATION AND THE ESTABLISHMENT OF JUST AND REASONABLE COMPENSATION FOR SUCH SERVICES, TRACKS AND FACILITIES

Decided November 20, 1978

On reconsideration, findings in the prior report, 354 I.C.C. 552, modified and the period for which the prescribed compensation formula for the use of tracks and facilities shall be in effect limited to the period ending October 4, 1978, in order to accommodate the changes the Amtrak Improvement Act of 1978 made to section 402(a) of the Rail Passenger Service Act.

Gordon Forbes, Robert G. Gehrz, Shirley Brantingham, and *Henry E. Szachowicz, Jr.* for appellants.

Victor D. Ryerson and *Frederick C. Ohly* for appellee.

DECISION

This is an appeal by the Minnesota Transfer Railway Company (MTRC) from our decision establishing just and reasonable compensation for the services and the use of tracks and facilities provided to the National Railroad Passenger Corporation (Amtrak) by MTRC, pursuant to section 402(a) of the Rail Passenger Service Act (RPSA), 45 U.S.C. 562(a).[1] Amtrak has filed a reply.

The statement of facts in the prior report is correct in all material respects, and, as supplemented, is adopted in this report. The facts will be restated only as needed for discussion.

We affirm our prior decision fixing the compensation to which MTRC is entitled with several modifications.

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[1] Burlington Northern, Inc., Chicago, Rock Island & Pacific Railroad Company and Soo Line Railroad joined in MTRC's appeal. They are collectively referred to as MTRC.

READEX FICHE best copy available

PROCEDURAL MATTERS

In its appeal, MTRC seeks the opportunity to introduce additional evidence. MTRC submits a more detailed map of its railroad terminal facilities in Minneapolis and St. Paul, MN, and an additional verified statement of J. A. Lehn, vice president and general manager of MTRC. The evidence clarifies several material points in dispute and is, therefore, not cumulative.

No reason is given why this evidence was not submitted along with MTRC's opening verified statements. In our prior decision, we criticized the parties for their failure to present us with a complete record upon which to base our decision. We will accept MTRC's evidence so that the case may be decided on a more complete record. However, we caution the parties that the strict time constraints imposed by the Railroad Revitalization and Regulatory Reform Act of 1976 make it necessary to expedite all proceedings concerning common carriers by railroad. We cannot consider additional evidence ad infinitum. Parties who fail to present us with sufficient evidence at the outset, without cause, do so at their own risk. In the instant case, Amtrak does not object to the additional evidence and we can consider such additional evidence without further delaying this proceeding.

MTRC also requests the Commission to reopen the record for further "filings, briefs and arguments so that an equitable result might be achieved." The record as supplemented contains sufficient evidence from which we can reach an equitable result. We recognize that the additional evidence MTRC submits, does not complete the record to our total satisfaction. However, if we permitted another round of pleadings, the mandate in section 402(a) of RPSA, 45 U.S.C. 562(a) to expedite this type of proceeding, will be frustrated. Accordingly, we will deny the request for a further hearing.

DISCUSSION AND CONCLUSIONS

In setting the compensation to be paid by Amtrak for the provision of MTRC's services and for the use of tracks and facilities, section 402(a) of the RPSA provides that such compensation be just and reasonable. The term just and reasonable implies the application of good judgment and fairness, of common sense, and a sense of justice to the facts of record. ***National R. Pass. Corp. and***

TRRA Just Compensation, 348 I.C.C. 901, 916 (1977) (*TRRA* case). However, in our prior report, we determined "just and reasonable" compensation for services provided to Amtrak based on the incremental cost limitation provided in section 402(a). We disagreed with Amtrak that that limitation also applies to its use of MTRC's track and facilities.

LIABILITY PROVISION

MTRC takes issue with the amount we found Amtrak must reimburse to MTRC for the cost of additional insurance. We do not agree with MTRC. In principle, section 7.2 of Amtrak's current basic agreement with the contracting railroads provides the better allocation of insurance costs.

In our prior decision, we recognized that Amtrak will be treated as any other user of tracks and facilities and will be expected to pay its fully allocated share of costs. Ideally, Amtrak should pay for all damage resulting from its negligence. To assess Amtrak for the cost of insuring against its acts of negligence would be just because such costs arise directly from Amtrak's operation. MTRC and Amtrak disagree on how to apportion such costs.

MTRC proposes that Amtrak fully indemnify it for all casualty losses except casualties sustained by MTRC's employees and property where MTRC is solely negligent. This proposal has much to recommend it because it apportions responsibility based on fault.[1] However, it is unacceptable because it obligates Amtrak to pay for more than the costs of insuring against its own negligence. For example, if a casualty was sustained where MTRC was 99-percent negligent and Amtrak was 1-percent negligent, Amtrak would bear the full loss under MTRC's proposal. Amtrak will have to purchase insurance to protect against this type of loss. This is not a just allocation.

By contrast, under Amtrak's proposal, section 7.2 of its current basic plan, MTRC would bear the cost of insuring against casualties sustained by its employees and property to the extent it is negligent. Amtrak would bear the complete risk of liability for the death or injury of Amtrak's passengers and Amtrak's employees, and for death, personal injury, or damage to the property of third persons resulting from grade crossing accidents involving Amtrak trains. Amtrak would insure against damage to any of its trains and equipment regardless of fault. Amtrak would also bear the *costs* of insuring against injury to MTRC property where Amtrak was at fault. While MTRC is to purchase insurance to cover all the risk of casualty to its property, Amtrak will defray that part of the cost of insuring against Amtrak's negligence.

The Amtrak plan is the more reasonable approach. It not only achieves a fair apportionment of the liability costs, it simplifies the indemnification process once a casualty occurs. While Amtrak must bear the costs of insuring MTRC's personnel and property against Amtrak's negligence, MTRC procures the insurance. In this way the same insurance carrier will insure MTRC against the negligence of both MTRC and Amtrak. Such an allocation is meritorious because it avoids lengthy and complicated disputes over causation and fault between Amtrak and MTRC once a casualty occurs. In the long run this plan is cheaper and it is administratively convenient. It thus meets the statutory criteria of justness and reasonableness.

MTRC's claim that it is subsidizing Amtrak is untenable. Amtrak is insuring against all the risks of casualty directly related to its operations, but not the risks directly related to MTRC's operations. If we were to require Amtrak to fully indemnify MTRC for every casualty, we would be requiring Amtrak to subsidize MTRC. Such a result is contrary to section 402(a) of RPSA. MTRC's plan would also frustrate the congressional purpose expressed in section 101 of the RSPA.

It is premature for MTRC to contend that it will not be adequately compensated. Our prior decision did not fix the amount by which Amtrak is to reimburse MTRC for insuring against casualties to MTRC caused by Amtrak's negligence. MTRC has offered no evidence as to what its increased insurance cost might be. On the contrary, during the modified procedure, MTRC expressly requested the Commission to defer resolution of this question until it finds out what the additional insurance will cost. We acceded to this request by directing the parties to negotiate the costs of the section 7.2 reimbursement among themselves. We stand by our prior decision.

TRACKS AND FACILITIES

Statutory amendment.—Our prior decision was based on the terms of section 402(a) of the RPSA, *supra,* as amended by the Amtrak Improvement Act of 1973, Public Law 93-146, §10, 87 Stat. 552 (codified at 45 U.S.C. 562(a) (1973)). We held that section 402(a) required Amtrak to pay a reasonable share of the attributable but not directly assignable costs for its use of tracks and facilities without limitation by the incremental costs standard in section 402(a). We expressly rejected Amtrak's argument that it was only required to reimburse MTRC for the incremental costs associated with its use of the tracks. We decided that Amtrak was required to defray a portion of MTRC's common costs as well. In reaching this result we relied upon our decisions in ***Amtrak and Tex. and P. Ry. Co., Just Compensation,*** 348 I.C.C. 645 (1976), (***T&P*** case) and the ***TRRA*** case, ***supra.*** While Amtrak still resists this construction of the law, they have offered no new arguments which would cause us to reverse our position.

Subsequent to our prior decision, and subsequent to the time MTRC filed its appeal, section 402(a) of the RPSA was amended by the Amtrak Improvement Act of 1978, Public Law 95-421, (Oct. 5, 1978). Section 15 amended section 402(a) of the RPSA by inserting the words "or for the use of tracks and facilities" immediately after "provision of services" in the third sentence.[2] However, Congress intended this change to be prospective only. The Conference Report on the Amtrak Improvement Act of 1978, H. Rept. 95-1478, 95th Cong., 2d sess. 20 (1978) states that the conferees expect the Commission and the courts to give this amendment prospective application only. See also 124 Cong. Rec. H 10133 (daily ed. Sept. 19, 1978) (Remarks of Rep. Skubitz). Thus, the new formula by which Amtrak is to compensate MTRC for the use of tracks and facilities is applicable on October 5, 1978 and thereafter. Prior to October 5, 1978, Amtrak must compensate MTRC under the preexisting compensation standard, applied in our prior decision, as modified herein. See also ***T&P*** case at 657.

Having determined that the amendment is to be given prospective application only, we must decide how it affects our decision for the period after October 4, 1978. The effect of the amendment is, that, for the future, the Commission is to determine compensation for Amtrak's use of another railroads' tracks and facilities, on the basis of the incremental cost limitation already provided in section 402(a) for the provision of services. We find that it would be inappropriate, at this time, to award MTRC compensation for Amtrak's use of its tracks and facilities after October 4, 1978. The statutory change comes late in this proceeding, after the parties have presented their cases on appeal from our prior decision. The circumstances have now materially changed. The record does not reflect either party's proposals for compensation for the use of MTRC's track and facilities under the amended statute. The parties have yet to formulate their positions as to the appropriate method for determining compensation in excess of incremental costs under the new provision. We prefer to give the parties an opportunity to reach an agreement among themselves as to the compensation due under the new statutory guidelines. Under the statute the parties must be given the opportunity to resolve this among themselves before our jurisdiction to arbitrate the matter is invoked. However, the parties may always return here, should they be unable to agree on the compensation for the use of tracks and facilities *after October 4, 1978*. No similar reasons exist for compensation for the provision of service.

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[2] Section 402, Facilities and Service Agreements, provides in pertinent part:

> (a) The Corporation may contract with railroads or with regional transportation agencies for the use of tracks and other facilities and the provision of services on such terms and conditions as the parties may agree. In the event of a failure to agree, the Interstate Commerce Commission shall, within ninety days after application by the Corporation, if it finds that doing so is necessary to carry out the purposes of this Act, order the provision of services or the use of tracks or facilities of the railroad by the Corporation, on such terms and for such compensation as the Commission may fix as just and reasonable, and the rights of the Corporation to such services or to the use of tracks or facilities of the railroad or agency under such order or under an order issued under subsection (b) of this section shall be conditioned upon payment by the Corporation of the compensation fixed by the Commission. In fixing just and reasonable compensation for the provision of services ***or for the use of tracks and facilities*** ordered by the Commission, under the preceding sentence, the Commission shall, in fixing compensation in excess of incremental costs, consider quality of service as a major factor in determining the amount (if any) of such compensation ***. [Emphasis added.]

Accordingly, our prior decision is modified to limit the award of compensation for the use of tracks and facilities to the period up through October 4, 1978. When we consider the points raised by MTRC in its appeal, or the points raised by Amtrak in its reply, which touch on the use of tracks and facilities, we will limit our decision to awarding compensation prior to October 4, 1978. To the extent that our prior decision fixed compensation for the provision of services and the reimbursement for liability insurance, as modified here, it remains effective until the Commission orders otherwise, inasmuch as these determinations are not effected by the 1978 amendment.

Track running rights.—In our prior decision, we fixed the reasonable amount Amtrak must pay for the use of MTRC's track at $468 per month. In arriving at this figure, we determined that Amtrak should pay for 20 percent of the rental value of the line because Amtrak will use the track 20 percent of the time.[3] MTRC

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[3] Track (11.100 track feet) x ($20 per track foot) x (7.5-percent return) x (20-percent Amtrak benefit) divided by (12 months) equals	$277.50
Land (11.100 feet - 2.150 feet length) x (17 feet width) x ($1 per square foot) x (7.5-percent return) x (20-percent Amtrak benefit) divided by (12 months) equals	190.18
Total	$467.68

argues that Amtrak receives 75 percent of the benefit derived from the line. Upon the additional evidence now before us, we find that Amtrak will receive a 75-percent benefit from the track.

We arrived at the 20-percent benefit figure upon finding that 160 cars moved over MTRC's line per day and that Amtrak would move 39 cars per day over the line. We reasoned that if Amtrak moved 39 out of 199 cars over the line, them Amtrak's benefit was 20 percent.

MTRC complains that we understated the number of cars that Amtrak will run per day. In our prior decision, we took notice of the "Official Railway Guide" of March 1978, which identified three trains per day with a total of 39 cars using the track. This figure was used notwithstanding that the parties anticipate four trains will operate instead of the three trains scheduled in the "Official Railway Guide." We are not persuaded. Whatever the number of trains, MTRC argues that Amtrak moved 36 cars per day. We, therefore, see no basis for revising our prior estimate.

MTRC contends that it was erroneous for the Commission to find that MTRC would move 160 cars per day over the track Amtrak will utilize. The evidence purportedly showed it moved 160 cars over its entire track, and that a portion of MTRC's traffic did not traverse the track utilized by Amtrak. MTRC supports this assertion with a verified statement of its vice president and general manager, J. A. Lehn, as well as a more detailed map of MTRC's terminal facilities. The additional evidence is offered to show the percentage of MTRC's 160 cars, which traverse the track shared with Amtrak. Of the 11,100 feet of track involved, MTRC indicates the three segments of this track have varying degrees of usage. Based on actual car counts, the 2900-foot segment between the Milwaukee connection to the south and the last switch serving the Amtrak station from the south handled an average of 89 cars belonging to MTRC and its owners per day. Amtrak moved 36 cars per day over this section of track. Amtrak would thus derive a 29-percent benefit from this section of track and MTRC will receive a 71-percent benefit. However, the main running track Amtrak will use, extending from the switch above mentioned to Raymond Avenue to the north, is utilized almost exclusively, 95 percent of the time, by Amtrak. MTRC uses the switch track in MTRC's yard to cover the same distance. Finally, MTRC maintains that Amtrak makes use of the 1600-foot Milwaukee wye track 80 percent of the time. Thus, of the total 11,100 feet of track, MTRC assigns to Amtrak a weighted averaged benefit use of 8,391 feet and assigns to itself a weighted average use benefit of 2,709 feet. In other words, Amtrak receives 75 percent of the benefit from the track, according to MTRC.[4]

Amtrak does not dispute these figures. Neither does it argue that it would be unfair to assign it a weighted average use of 75 percent when it makes varying uses of three separate segments of the track ranging from 29 percent to 95 percent. Such an apportionment would necessitate a much more complicated accounting of costs which is not justified given the short length of track to be used. Considering that MTRC's calculation of the benefit is not controverted, that Amtrak does not claim any unfairness to it, and that the apportionment of costs based on actual use of each track segment would unduly complicate the cost calculations, we find that for the purpose of apportioning costs, it is appropriate to consider Amtrak to have derived a 75-percent benefit from the use of the track as a whole.

Substituting the 75-percent benefit figure in our formula for computing the compensation due to MTRC for the running rights, we conclude that Amtrak should pay a monthly fee of $1,754.[5] This fee should be paid from February 1978 when Amtrak commenced usage of MTRC's tracks, until October 4, 1978.

Track maintenance.—We fixed that amount of compensation for track maintenance at $101.75 per month. This was based on an estimate of $0.55 maintenance cost per track foot, and a use benefit

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Track	Length in feet	Amtrak percent benefit	Amtrak's weighted benefit	MTRC's percent	MTRC's weighted track benefit
	Feet		*Feet*		*Feet*
Milwaukee connection	2900	29	841	71	2,059
Raymond Avenue connection	6600	95	6,270	5	330
Milwaukee wye	1600	80	1,280	20	320
Total			8,391		2,709

Based on the above figures, Amtrak benefits from 8,391 out of 11,100 feet of the track to be shared.

[5] Track (11,100 track feet) x ($20 per track foot) x (7.5-percent return) x (75-percent Amtrak benefit) divided by (12 months) equals ---------- $1,040.63

Land (11,100 feet - 2,150 feet length) x (17 feet width) x ($1 per square foot) x (7.5-percent return) x (75-percent Amtrak benefit) divided by (12 months) equals ---------- 713.20

Total monthly payment ---------- $1,754.00

of 20 percent.[6] Because we have decided that 75 percent is the correct usage benefit, we must substitute this figure in our formula and increase the compensation due for maintenance.

MTRC also contends that the Commission understated the cost of maintenance per track foot. It argues that $1 per track foot is reasonable and that the figure the Commission arrived at was arbitrary. In arriving at a cost of $0.55 per track foot, we took notice of 27 of the most current abandonment applications filed. We rejected MTRC's figure because there was not evidence to support it.

MTRC challenges the use of the data we officially noticed, because it is not part of the instant record and it has not been shown that MTRC's track requires the same level of maintenace. MTRC's track contains 15 turnouts which adds to the cost of maintenance. There is no showing, according to MTRC, that the comparison track is located in a similar geographic area with a comparable level of usage. There is no showing that the expense to maintain the rehabilitated track would be the same as MTRC's track; and that not all of MTRC's track will be upgraded without cost of MTRC.

When we were first asked to decide a reasonable maintenace reimbursement, neither party offered a reasonable substantiated projection of maintenance costs. MTRC's historical maintenance experience was not shown. In such case, it was appropriate to take notice of the maintenance costs in other cases for purposes of comparison. MTRC now offers additional evidence, including an account-by-account projection for track maintenance for all of its track, aggregating $357,068. This itemization is mostly based on historical costs for 1976. MTRC does not rely on historical costs for projecting several of the component costs of roadway maintenance. It explains that in the past it has been able to salvage considerable amounts of ties, rail, and other track material which has been used in the repair of remaining trackage, thereby reducing historical maintenance of roadway expenses. These salvage materials will not continue to be available in years to come. For this reason the tie, rail, and other track material projections are based on the cost of acquiring the necessary new and used materials on the open market. MTRC also allows for 5-percent inflation to arrive at total estimated maintenance of $374,921, which converts to $1 per track foot. ($374,921) divided by (71 miles x 5280 feet) = $1 per track foot).

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[6] (11,100 feet) x ($0.55 per track foot) x (20-percent Amtrak benefit) divided by (12 months) equals---------- $101.75

Amtrak does not assail this projection, but argues that the Commission's approach is equally valid because MTRC's line was upgraded at no expense to it. However, MTRC has raised valid questions as to the comparability of the data we officially noticed. We believe the best available projection as to the cost of maintenance would be based upon MTRC's historical cost for maintaining this track. This is especially so where the length of track is short, 71 miles, is located in a relatively small area, Minneapolis-St. Paul, and it is devoted to terminal operations, which usage is highly intensive.

We do not agree with MTRC, that past costs associated with roadway maintenance are no longer relevant. MTRC gives no indication when salvaged ties, rail, and other track material will be unavailable to help offset further track maintenance costs. It argues only that at some time in the future such salvage material will be exhausted. Such a statement is too indefinite to be given weight. Moreover, MTRC overlooks that the 9,550-foot segment of the track from Merriam Park to St. Anthony tower was upgraded by replacing 85 to 95-pound rail with 110 to 115-pound rail, at no expense to MTRC. The replacement of ties, rail, and other track components will spare MTRC additional roadway maintenance expenses in the years to come. Thus, we will rely exclusively on historical costs for purposes of this determination, which as noted, is limited to the period ending October 4, 1978.

We have taken official notice of MTRC's annual reports for 1976 and 1977 to ascertain what MTRC's roadway maintenance costs were in those years. This data is not presently of record. No prejudice will result to MTRC because these are records that MTRC has filed with the Commission and MTRC has relied on historical cost data to support its position. Similarly, Amtrak will not be prejudiced because it was presented with the historical costs in support of MTRC's argument and Amtrak did not object to it. Neither did Amtrak seriously assail MTRC's projections for roadway maintenance. Because the actual 1976 and 1977 roadway maintenance expenses which we will officially notice are lower than those projected by MTRC, Amtrak will not be prejudiced. Nonetheless, the parties will be entitled to file, within 30 days after service of this decision, petitions seeking reconsideration in which they will be entitiled to submit further financial data or to explain that being considered in this decision. See ***United States*** v. ***Pierce Auto Lines,*** 327 U.S. 515, 529, 530 (1946); ***Market Street Ry. Co.*** v.

Railroad Commission of California, 324 U.S. 548, 561, 562 (1945); and *R. C. Motor Lines, Inc.—Control,* 116 M.C.C. 764, 773 (1974).

The 1976 and 1977 annual reports indicate that MTRC incurred roadway maintenance expenses of $177,703 and $163,596, respectively. This is significantly lower than the $247,437 maintenance expense projected by MTRC. For purposes of comparison, MTRC's projections and the historical costs reflected in its annual reports are set forth in appendix A. Based on MTRC's costs for 1976, we calculate that it will incur maintenance of 75¢ per foot. Based on its costs for 1977 we calculate maintenance would be 71¢ per foot. The average for the 2 years is 73¢ per track foot. We conclude, therefore, that a reasonable estimate is 73¢ per track foot. See appendix A.

Thus Amtrak should pay MTRC monthly maintenance costs of $506.43 up through October 4, 1978.[7]

Compensation for use of roundhouse.—In our prior decision we awarded MTRC $1,728 per month as compensation for the use of the involved roundhouse tracks and facilities. Neither party is aggrieved by this finding. However, we find that it must be modified for the sake of consistency with our finding that maintenance per track foot is properly 73¢. We find that Amtrak should pay MTRC $1,730 per month for the involved roundhouse, tracks, and facilities during the period from February 1978 until October 4, 1978.[8]

Taxes.—MTRC complains that the Commission failed to order Amtrak to reimburse it for any additional taxes on earnings, sales, and payroll which are paid by MTRC as a result of Amtrak's operations and presence. In our prior decision we recognized that the parties agreed to such reimbursement. We ordered Amtrak to reimburse MTRC in accordance with the guidelines set out in that decision. We feel that our prior decision did direct Amtrak to pay such taxes. However, to clarify the record, we find reasonable that Amtrak should reimburse MTRC for any increase in gross receipts taxes, payroll taxes, and any State, local, or other sales taxes attributable to Amtrak's use of the facilities. Amtrak has no objection to the imposition of this condition.

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[7] (11,100 feet) x (73¢ per track-foot maintenance) x (75-percent Amtrak benefit) divided by (12 months) equals ---------- $506.43
We have not included an inflation factor as did MTRC. Inflation will be discussed under a separate heading in this report.

[8] Shop—(5,360 square feet area) x ($3.50 rental rate) divided by (12 months) equals- 1,563.33
Storage area—(400 square feet area) x ($3.50 rental rate) divided by (12 months) equals- 116.69
Trackage—(480 track feet) x ($10 per foot) x (7.5 percent return) x (0.375 benefit) divided by (12 months) equals ---------- 11.25
(480 feet of land x 17 feet area) x ($1.50 per square foot) x (7.5 percent return) x (0.375 benefit) divided by (12 months) equals---------- 28.69
(480 track feet) x (73¢ maintenance/foot) x (0.375 benefit) divided by (12 months) equals 10.95
Total monthly payment ---------- $1,730.91

MTRC also argues that our order requiring Amtrak to pay 29 percent of the increase in ad valorem property tax and 29 percent of the ad valorem property tax currently levied is meaningless because there is no ad valorem tax currently in effect. Upon reviewing the record, we find that MTRC is not currently assessed an ad valorem tax on its property.

MTRC and Amtrak predict that such a tax will be imposed in the near future and ask the Commission to determine how such tax should be allocated when it is imposed. The apportionment of this tax is governed by the recent amendment to section 402(a). We previously held that it would not be appropriate to resolve the proper compensation for Amtrak's use of MTRC's tracks and facilities after October 4, 1978. Our reasons apply here also. Given the late hour amendment to section 402(a), we feel the parties should first attempt to resolve this matter between themselves.

INFLATION

MTRC is also dissatisfied because the Commission did not provide for an adjustment of costs for inflation. MTRC contends that the failure to incorporate such provision will deprive MTRC of just and reasonable compensation in the future and is a taking of MTRC's property without full compensation. Amtrak expressly consents to the imposition of such a condition. Each party suggests that the adjustment should be tied to percentages of the Association of American Railroads Quarterly Index of Spot Prices of Railroad Materials and Supplies, excluding fuel, Class I Railroads, Western District, and the Association of American Railroads Quarterly Index of Spot Prices of Railroad Labor, Class I Railroads, Western District. We find that a provision for inflation is reasonable. Our prior decision is modified to include this provision.

MISCELLANEOUS

Amtrak has not appealed from our prior decision. However, included in its reply to MTRC's appeal, is a request that the Commission clarify or modify several portions of its decision.

In the first place, MTRC complains that the performance standard is unworkable because all or substantially all of the terminal operations are performed by Amtrak employees, and not MTRC employees. The only service performed by MTRC employees is the lining of switches. Amtrak complains that it is inappropriate to reward MTRC upon the timely performance by Amtrak. We do not agree.

If MTRC's union commitments obligate it to provide switching services, we conclude that there is a potential for MTRC to place the needs of its freight operation over Amtrak's passenger operation. In this event, the services MTRC will provide, will be critical to the quality of performance by Amtrak. The best efforts of Amtrak's employees will come to naught should MTRC provide less than adequate service. Our standard emphasizes the relative importance of MTRC's services because on-time performance is to be judged from the time the train is delivered to the terminal until the time the train leaves the terminal or reaches its destination at the terminal site. Additionally, the base line level of 95 percent on-time performance, as opposed to a lower level, will only be achieved where both Amtrak and MTRC's employees cooperate. It follows that MTRC will only be entitled to incentive compensation of an appropriate portion of common costs where its employees timely perform the services needed by Amtrak.[9]

Amtrak also points out that the decision in unclear whether the services of yardmasters' supervision is included in the common switching expense. Amtrak notes that the payment of yardmaster costs in addition to the common switching costs would result in double payment of the former. We did not intend by our report to authorize a double payment. MTRC has a right to recover both the incremental costs and a portion of the common yardmasters' expense, if it meets the performance standard. The common yard master expense shall not be counted twice.

Amtrak also complains that our allocation of the cost for clearing wrecks is inconsistent with our apportionment of the costs of procuring liability insurance. In our prior decision, we agreed that the wreckage provision should be consistent with the liability provision. However, we find our decision on the wreckage question is not totally consistent with our decision on liability.

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[9] While we have left the times to be associated with this performance standard to be negotiated by the parties, we admonish Amtrak to be realistic. In this connection, we would point out that we do not view performance standards which permit a railroad to recover all costs appropriately assignable to Amtrak's use of its facilities upon satisfaction of a reasonable level of performance to be a "reward." This is particularly so where the person whose facilities are required to be made available by the Commission order received no benefit from passage of the Rail Passenger Service Act of 1970.

As previously indicated, in adopting Amtrak's liability proposal we had the dual objective of imposing upon Amtrak the cost of its negligent acts and avoiding lengthy disputes over causation and fault. Our resolution of the wreckage issue accomplished only one of those objects. We decided that where the wreckage results from the collision of an Amtrak train with another train, Amtrak must pay for the clearing of all objects from the tracks, except MTRC's property. The implication was that MTRC should clear away its own property. However, we made no provision for MTRC to be reimbursed for this expense, where Amtrak is negligent. Such reimbursement is necessary if Amtrak is to bear the entire cost of its operations. We direct the parties to negotiate the cost of this reimbursement at such time as they negotiate the cost of the section 7.2 liability reimbursement.

When we resolved the wreckage question, we stated that the allocation of liability for the repair of tracks and roadbeds would be left to common law liability principles. On reconsideration, we find that such an approach is administratively inconvenient because it might involve lengthy disputes over causation and fault. Thus, it fails to accomplish one of the goals achieved in resolving the liability issue. However, we need not dwell on this problem, because the proper allocation of this expense is already accomplished by the section 7.2 liability provision. To clear up any confusion on this issue we modify our prior decision and conclude that apportionment of liability for repair of roadbed and tracks should be made in accordance with the terms of section 7.2 of its current basic agreement with contracting railroads. Thus, MTRC must repair its own tracks and roadbed, but Amtrak must reimburse MTRC for this expenditure or for the cost of insuring against this casualty.

It is ordered:

(1) The record is reopened for the receipt of the additional evidence submitted by MTRC.

(2) MTRC's request for oral hearing is denied.

(3) The National Railroad Passenger Corporation shall pay compensation to the Minnesota Transfer Railway Company for the costs incurred by the latter on behalf of the National Railroad Passenger Corporation for the period beginning with the opening of the new terminal facility in the Minneapolis-St. Paul area (a) in providing the use of tracks and facilities, until October 4, 1978 and (b) in providing services and in purchasing additional liability insurance, until such time as the Commission shall order otherwise. Such compensation shall be computed according to the specific

guidelines set forth in our decision entered May 4, 1978 as modified in this decision.

(4) Except as herein modified, the decision of the Commission of May 4, 1978, shall be effective 30 days from the date this decision is served.

By the Commission, Division 1, Acting as an Appellate Division, Commissioners Brown, Gresham, and Christian.

APPENDIX A

Comparison of MTRC's historical track maintenance costs with costs projected by MTRC

Cost account	MTRC projection		Annual reports	
			1976	1977
Superintendance	63,382	63,382	63,382	61,991
Roadway maintenance:				
Roadway maintenance	9,243			
Bridges, trestles, and culverts	1,089			
Ties	60,421			
Rail	19,906			
Other track material	30,000			
Ballast	3,738			
Track laying and surfacing	87,970			
Fences, snowleds, and signs	70			
Removing snow, ice, sand	35,000			
Total		247,437	177,703	163,596
Maintaining structures roadway buildings	57	57	57	57
Other N/W expenses:				
Roadway machines	9,030			
Public improvements maintenance	6,222			
Small tools and supplies	4,683			
Total		19,935	13,755	15,607
Road property depreciation	8,000	8,000	8,000	8,000
Health and welfare	18,257	18,257	18,257	18,257
Total cost		$357,068	$281,154	$267,508
		357,068	281,154	267,508
Cost per foot = cost / 71 mi. x 5280 ft.	.95	374,880 749	374,880 .713	374,880

No. AB-187 (Sub-No. 1)

NORTHAMPTON AND BATH RAILROAD COMPANY—ABANDONMENT NEAR NORTHAMPTON AND BATH JUNCTION IN NORTHAMPTON COUNTY, PA

Decided November 27, 1978

1. Employee protective conditions should be imposed on a corporate parent when as a result of an entire line abandonment, the parent would receive significant benefits in addition to being relieved of the burden of deficit operations of its subsidiary railroad.
2. In No. AB-187 Sub-No. 1), upon reconsideration, imposition of employee protective conditions found unwarranted because corporate parent will receive no significant benefit from subsidiary's entire line abandonment. Proceeding also reopened to receive certain supplemental evidence.

John D. Morrison, William C. Leiper, Michael T. Reilly, Henry W. Wick, Jr., and *Stanley E. Levine* for applicant.

John O'B. Clarke, Jr., and *Joseph Guerrieri, Jr.,* for Railway Labor Executives Association.

Decision

On June 23, 1978, the Northampton and Bath Railroad Company (NB) filed a petition seeking administrative review of the May 15, 1978 decision of the Commission, Review Board Number 5 which authorized the abandonment of the railroad's entire line. Applicant appeals the imposition of employee protective conditions.[1] At the same time, NB filed a petition to reopen the proceeding for the introduction of supplement evidence intended to demonstrate that NB's private pension plan adequately protects the employees' interests. On July 13, 1978, Railway Labor Executives' Association (RLEA) filed a reply to NB's appeal. No reply to the petition to reopen has been filed.

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[1] The conditions imposed were those set forth in *Oregon Short Line R. Co.—Abandonment—Goshen*, 354 I.C.C. 76 (1977). These conditions which represent a customary minimal level of protection where appropriate were revised upon further consideration at 354 I.C.C. 584 (1978).

The central issue in this proceeding is whether employee protective conditions should be imposed in an entire line abandonment. Relying upon ***East Carolina Ry. Abandonment,***[2] the review board imposed conditions on NB's corporate parent, United States Steel Corporation (USS). The review board found that USS would be relieved from NB's operating losses while receiving continued rail service over lines belonging to Consolidated Rail Corporation, benefits justifying the imposition of employee protective conditions.

NB argues the review board did not properly apply Commission precedent concerning labor protection in entire line abandonments, especially the *East Carolina* exception. RLEA takes the position that section 1(a)(4) of the Interstate Commerce Act as amended by the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act) requires the imposition of employee protective conditions in entire line abandonments.

Section 1(a)(4) includes the following statement relative to certificate of abandonment.

> Each such certificate which is issued by the Commission shall contain provisions for the protection of the interests of employees. Such provisions shall be at least as beneficial to such interest as provisions established pursuant to section 5(2)(f) of this Act and pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565).[3]

The Commission has previously considered whether this section requires imposition of employee protective conditions when abandonment of an entire line is sought. In ***Wellsville, Addison & Galeton R. Corp.—Abandonment,***[4] based on legislative history of the 4R Act, the Commission concluded that Congress did not intend to curtail the Commission's discretion regarding protective conditions in entire line abandonments.[5]

After the entire line of a railroad is abandoned, no operating carrier remains to enjoy the benefits of the abandonment or pay the costs of employee protection. The Commission has generally refused to impose employee protective conditions which would, in effect, require continued operation for the benefit of employees or further consumption of a failed railroad's properties for payment of employees' benefits after operations cease.[6] The conditions imposed by the review board, those developed in ***Oregon Short Line***, are not appropriate for an entire line abandonment where the abandoning railroad has no rail carrier affiliate which continue operations similar to its own. For example, normally, employees who are displaced or dismissed because of an abandonment are required to exercise seniority rights where possible to obtain another position. This being impossible where all rail service ceases, the parent would be forced to provide the full 6 years dismissal allowance with no hope of reducing this burden by using the employee's services elsewhere.[7]

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[2] 324 I.C.C. 506, 520-2 (1964).

[3] The *Oregon Short Line* conditions were developed pursuant to this requirement.

[4] 354 I.C.C. 744, 745-6 (1978).

[5] H.R. Report No. 94-781, p. 218 includes the following language:

> The new section *** (5) required employee protection no less beneficial than that established under section 5(2)(f) of the Interstate Commerce Act and section 405 of the Rail Passenger Service Act *but without intention to change the policy and practice of the Commission in connection with certificates involving total termination of service by a* railroad company *** [emphasis added].

The Commission has recognized exceptions to the policy of not imposing employee protective conditions on entire system abandonments where there is a corporate parent who will benefit from the abandonment and who can be made responsible for its costs. This may occur when the parent is a rail carrier who intends to assume all or some of the subsidiary's operations but be relieved of its deficit operations.[8] Also, employee protective conditions are imposed on a parent, whether or not it is a carrier, if the financial benefits from disposition of the properties far exceed the sum of the parent's net investment in the subsidiary, and the aggregate of the operation deficits incurred by the subsidiary in the years following the parent's acquisition of the subsidiary stock.[9]

Neither of these two instances provides a basis for the imposition of labor conditions on the facts of this case. The review board, relying on ***East Carolina, supra***, found that USS, the noncarrier parent would benefit as it would continue to receive service from Conrail as a shipper without having to bear the cost of NB's losses. ***East Carolina*** is distinguishable from this case as there the railroad company seeking to abandon its trackage was a wholly owned subsidiary of another railroad, the Atlantic Coastline Railroad Co.

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[6] See *Susquehanna & N. Y. R. Co. Abandonment*, 252 I.C.C. 81 (1942); *Black Mountain Ry. Co. Abandonment*, 290 I.C.C. 238 (1954); *Okmulgee Northern Ry. Co. Abandonment*, 320 I.C.C. 637 (1964); *Tennessee Central Ry. Co. Abandonment*, 333 I.C.C. 443 (1968); *Bush Terminal R. Co. Entire Line Abandonment*, 342 I.C.C. 34 (1971).

[7] See No. AB-133, *Warren and Quachita Valley Railway Company Abandonment Between Warren and Banks in Bradley County, Arkansas* (not printed) decided April 17, 1978.

[8] *Seaboard Air Line R. Co. Trackage Rights*, 312 I.C.C. 797 (1962); *East Carolina Ry. Abandonment*, 324 I.C.C. 506 (1964).

[9] See *Washington & Old Dominion R. Abandonment—Virginia*, 331 I.C.C. 587, 602 (1968), affirmed 287 F. Supp. 528 (E.D. Va. 1968).

The parent operated East Carolina as a part of its rail system and intended to purchase portions of the line to be abandoned. The Atlantic Coastline was not permitted to avoid providing protection for the wholly owned subsidiary. Similarly, in ***Seaboard Air Line R. Co. Trackage Rights, supra,*** labor conditions were imposed because the railrway seeking to abandon its trackage, the Savannah Union Station Company, was wholly owned by other railroads who would be continuing substantially similar operations at a nearby station they were authorized to construct. Here, abandonment will not take place in conjunction with the instituation of similar rail operations. The corporate parent, USS, will not continue similar operations upon NB's entire line abandonment. The possibility that the USS as a shipper may obtain service from a nonrelated carrier such as Conrail is not relevant. Accordingly, the first of the two bases described above for imposing protective conditions in an entire line abandonment is not present here.

Nor is the second criterion satisfied, i.e. the situation present in ***Washington and Old Dominion, supra,*** note 9, where the parent would derive substantial benefits over and above relief from the burden of deficit operations of the subsidiary. There is nothing in the record to indicate that USS will receive these additional benefits.[10]

NB contends that, as a matter of equity, the pension benefits available to its employees compare very favorably with the benefits under the ***Oregon Short Line*** formula. In its opinion, the NB pension plan itself justified approval of the abandonment without labor conditions. We will reopen the proceeding and admit the additional evidence on the pension plan, (the verified statement by Paul J. Bell, Staff Administrator-Labor Analysis & Statistics of applicant) because it enhances the record as to the affect of the abandonment on employees and it indicates that applicant has made conscientious provisions to protect its employees. Nonetheless, we need not reach the issue of whether the proposed alternative protection is as beneficial to employees in every respect as the standard ***Oregon Short Line*** conditions since Commission-imposed protection is not appropriate here.

This decision does not significantly affect the quality of the human environment.

It is ordered:

1. The petition to reopen the proceeding for the introduction of supplemental evidence is granted.

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[10] See *Bush Terminal R. Co. Entire Line Abandonment*, 342 I.C.C. 34, 51 (1971).

2. The decision of the Commission, Review Board Number 5, dated May 15, 1978, served May 22, 1978, is modified to eliminate imposition of the conditions for the protection of employees discussed in *Oregon Short Line R. Co.—Abandonment—Goshen*, 354 I.C.C. 76 (1977).

3. Except as modified, the decision of Review Board Number 5 is affirmed.

By the Commission, Division 1, Acting as an Appellate Division, Commissioners Brown, Gresham, and Clapp.

DOCKET NO. AB-11

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY—ABANDONMENT BETWEEN JOPPA JUNCTION AND FAYVILLE JUNCTION, ILLINOIS

Decided March 24, 1978

Application for authority to abandon line granted subject to conditions.

REPORT AND ORDER

DIVISION 1, COMMISSIONERS BROWN, GRESHAM AND CHRISTIAN

BY DIVISION 1:

By application filed November 27, 1972, Chicago & Eastern Illinois Railroad Company (C&EI) seeks authority under section 1(18-20) of the Interstate Commerce Act (act) to abandon its line between Joppa Junction and Fayville Junction, a distance of approximately 25.7 miles, in Johnson, Pulaski, and Alexander Counties, Ill.

The application was the subject of oral hearings in 1973. Two consolidated proceedings were heard with it: docket No. AB-11 (Sub-No. 1), in which C&EI sought to discontinue its trackage rights operations over the line of the Missouri Pacific Railroad Company (MoPac) between Fayville Junction and Thebes Junction, Illinois; and docket No. AB-11 (Sub-No. 2), in which C&EI sought to discontinue its operations under trackage rights over the line of the St. Louis-San Francisco Railway Co. (Frisco) between Rockview and Chaffee, Mo.

Issuance of the initial decision was delayed until 1976 pending an environmental review. At that time, the proceedings were assigned for a hearing *de novo,* since the record was considered stale. Upon a petition filed by C&EI, arguing that the record was adequate, the Commission served the 1973 initial decision, denying all three applications, April 21, 1976.

Exceptions to the initial decision were filed by C&EI, and a joint reply was submitted by protestants Illinois Commerce Commission, Pulaski and Alexander Counties, Meeks Grain Company, C. L. Casper and John W. McGinness. By order of October 29, 1976, the three proceedings were reopened for rehearing under modified procedure. It was noted that subsequent to the preparation of the initial decision, C&EI had been merged into MoPac pursuant to Commission authorization in ***Missouri Pac. R. Co.—Merger—T&P and C&EI***, 348 I.C.C. 414 (1976), modified 559 F. 2d 408 (1977), and that no evidence had been produced in this proceeding as to the financial status of MoPac. The order instructed the parties to direct their statements to the following issues:

> (1) traffic utilizing the line since the oral hearing, (2) changes in the cost of rehabilitation and operation over said lines and income or loss since 1972, (3) evidence of cost and income derived from the Rockville-Chaffee (sic) line, and (4) evidence as to the burden on MoPac from continued operations over said lines; (5) any other relevant matters they care to raise.

Applicant subsequently withdrew its related applications for discontinuance of trackage rights. One was mooted by the merger of C&EI into MoPac; applicant has determined to continue the other service.

We now have before us for consideration the verified statements and arguments under the modified procedure of the applicants, the protestants, and intervenor Edward C. Spatz. We must also act on the December 30, 1977, petition of MoPac to be substituted as the applicant, and the replies of protestants and intervenor.

PETITION FOR SUBSTITUTION

Although protestants and intervenor acknowledge that MoPac is the sucessor-in-interest to C&EI, they object to the substitution as not timely requested. They argue that the pre-1977 data reflects C&EI operations separate from those of MoPac, and that the substitution of MoPac would involve "entirely different financial and operational circumstances."

Protestants rely on ***Department of Pub. Serv. Reg., etc., Mont. v. United States,*** 344 F. Supp. 1386 (D. Mont. 1972), in arguing that, where an abandonment application is pending at the time of a railroad merger, the substitution is improper. We do not believe ***Department of Pub. Serv. Reg.***, supports that proposition. On the contrary, the court held that the record must be developed on, and the Commission must consider, the effect of the posthearing merger on the financial results of operations over the line. The combined entity resulting from the merger cannot be disregarded.

We find that the data submitted under the modified procedure are those of the MoPac system and that we have before us evidence as to the burden on MoPac from continued operations over the line. The substitution of parties is a mere formality in this situation, enabling a certificate of abandonment to be issued in the name of the carrier actually owning the line. Therefore, the petition for substitution is granted.

OTHER PROCEDURAL MATTERS

Protestants maintain that they have been denied due process and a fair hearing in this proceeding. Their arguments are: (1) that the proceeding should not have been reopened, since applicant had failed to file timely exceptions to the initial decision; (2) that the modified procedure is inappropriate and the proceeding should have been set for a second oral hearing; and (3) that denial of discovery precluded a fair hearing.

The first two arguments were considered and rejected by Division 3, Acting as an Appellate Division, Commissioners Brown, MacFarland and Clapp, by order of February 18, 1977. The third argument was rejected by this Division, Acting as an Appellate Division, by order of February 6, 1978 (Commissioner Christian dissenting). To eliminate any uncertainty, we will briefly outline the reasons for those decisions.

Protestants argue that since the exceptions were not filed within the 20-day period set forth in section 17(9)(b) of the act, as amended by section 303 of the 4R Act, the decision was final as a matter of law and the rehearing is improper.

In reply, applicant points out that under new section 17(9)(i), provisions of other sections of part I pertaining to deadlines in Commission proceedings shall govern to the extent they are inconsistent with the provisions of section 17(9). MoPac also notes that new section la(8) of the act provides that abandonment applications pending on the date of enactment of the 4R Act are governed by provisions of section 1 in effect at that time. Former section 1(19) provided that abandonment applications were under the rules and regulations prescribed by the Commission as to hearings and other matters; section 1100.96(b) of the Commission's General Rules of Practice in effect at the time allowed 30 days for filing exceptions to the initial decision. MoPac argues that rule 96(b) thus applied, and that the exceptions were timely.

MoPac cites ***Baltimore and Ohio R. Co. Abandonment,*** 354 I.C.C. 67, 73, footnote 4 (1977), as support for the argument that abandonment proceedings pending as of the date of enactment of the 4R Act are not governed by its procedural provisions. However, the statement cited applies to the specific regulations governing abandonment applications contained in former Part 1121 of Title 49 of the Code of Federal Regulations, prior to revision in Ex Parte No. 274 (Sub-No. 2).

Our consideration of applicant's exceptions should not be construed as acceptance of its argument. We believe that the statutorily prescribed time limitation prevails over a rule developed by this Commission. We have held that the procedural time limits of new section 7(9) apply to pending proceedings to the extent that the event triggering the time limit takes place after enactment of the 4R Act. Here, service of the initial decision was the triggering event for filing exceptions. The provision of a 30-day preeffectiveness period in the initial decision, without more, does not constitute authorization for an additional 10 days in which to file exceptions. However, it has been our policy to apply the procedural requirements of the 4R Act with leniency during the period of transition to those requirements, when failure to do so might preclude the parties from seeking timely judicial review. See No. AB-7 (Sub-No. 20), ***Chicago, Milwaukee, St. Paul and Pacific Railroad Company Abandonment Between Waukesha and Whitewater in Waukesha, Jefferson and Walworth Counties, Wisconsin*** (not printed), served June 8, 1977. Furthermore, we may rely on section 17(9)(g) for reopening this proceeding, since the posthearing merger constitutes substantially changed circumstances. For these reasons, we find the reopening to have been both permissible and proper.

Protestants alternatively claim that the proceedings should have been rescheduled for oral hearing. The type of hearing designated is a matter within our discretion. This application had already been the subject of one oral hearing. The purpose of the reopening was not to develop the record anew, but simply to update it and receive evidence on the financial effects of the MoPac-C&EI merger. For this limited purpose, written evidence is adequate.

Protestants argue that the public did not receive an adequate opportunity to be heard at the hearing because their witnesses were not allowed to testify before applicant had presented its evidence. The Administrative Law Judge's ruling was not an abuse of the discretion accorded him under rule 74 of the General Rules of

Practice in effect at that time (49 CFR 1100.74), and no denial of due process resulted. We have the testimony of the major shippers on the line. In the appendix to the modified procedure order, served August 2, 1977, protestants were directed, if requesting oral hearing, to state *specifically* what, if any additional information would be presented. Protestants have failed to do so; we have no reason to believe that the additional testimony would be other than cumulative. Also, protestants have failed to satisfactorily explain why the information could not have been produced under the modified procedure. We do not find an additional oral hearing to be necessary.

Finally, protestants maintain that the denial of their discovery request precluded a fair hearing. The reasons for the denial are set forth in detail in the order served November 29, 1977, and need not be repeated. It is sufficient to note that protestants failed to present a need for the requested information warranting further delay in the proceeding.

DISCUSSION AND CONCLUSIONS

The Administrative Law Judge found the traffic on the line insufficient to support profitable operations, and there was no evidence of future increases in traffic that would alter the situation. However, he recognized the harmful economic impact of the proposed abandonment on the shippers and local communities, as well as the overall prosperity of the MoPac system. He weighed the competing interests in favor of denial of the abandonment for two reasons. First, he found the decline in traffic could be partially attributed to abnormal equipment shortages. Secondly, he held that the diversion of overhead traffic to MoPac's Benton-Thebes route was improper and a violation of the restrictions imposed in *Missouri Pac. R. Co.—Control—Chicago & E.I.R. Co.*, 327 I.C.C. 279 (1965).

Our analysis of the expanded record leads us to the conclusion that the abandonment should be authorized. The evidence clearly supports a finding that the operations are a burden on the carrier. It continues to sustain losses in providing service over the line. The losses incurred on this line amounted to $61,922 in 1975, $29,259 in 1976, and $12,217 during the first 3 months of 1977.

Protestants dispute these loss figures, which were computed in the manner prescribed in the regulations adopted in Ex Parte No. 274 (Sub-No. 2), *Abandonment of Railroad Lines and Discontinuance of*

Service (1976), to be codified 49 CFR part 1121. They argue that the previously accepted 50-percent allocation formula is necessary to produce figures that would be comparable to the prior data in this proceeding. They also maintain that the 50-percent formula more accurately reflects off-branch costs.

We believe the variable unit cost method adopted in the new regulations is a more accurate means of calculating off-branch costs than the arbitrary percentage formula. See ***Baltimore and Ohio R. Co. Abandonment, supra*** at 73-74. We do not consider comparability of data to be essential when we can benefit from more reliable evidence than we previously had. Our analysis of the merits is not based on historical operations over the line, but on the present and prospective future operations. Thus, the previous data is relevant only to the extent that it illustrates consistent deficits that may be expected to continue into the future. We note that applicant was incurring deficits on this line in 1972, using the 50-percent allocation formula, and that it is continuing to incur losses under the variable unit costing methods. Protestants have not submitted evidence establishing that the line is in fact generating sufficient revenues to meet the cost attributable to its traffic.

There is no reason to believe that the line will be profitable in the future. Traffic has steadily declined in recent years, from 454 cars/year in 1970, to 373 in 1972, and 299 in 1977.[1] There is no evidence of expected future traffic increases.

The line is in poor condition and applicant requests that we consider its estimates of rehabilitation costs as part of the burden of providing continued service. It introduced evidence that the track meets Federal Railroad Administration class I standards only and that slow orders of 10 miles per hour have been imposed as a result. (The track characterization was disputed by a union representative who was not personally familiar with the track.) It would cost an estimated $1,233,575 to bring the line up to MoPac system standards.

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[1] Protestants dispute the traffic figures as inaccurate and not comparable to the figures introduced at the earlier hearing. In assessing the credibility to be attached to applicant's figures, we have considered the fact that they are drawn from regularly kept business records, that applicants have answered protestants' allegations of continued interchange traffic with an explanation for the apparent discrepancy, that evidence introduced in the environmental threshold assessment survey indicates that all interchange service was formally discontinued by Illinois Central Gulf Railroad on July 1, 1975, and that Tamms is no longer listed in the Official Railway Guide as an interchange point. We are satisfied that there is no longer any interchange or bridge traffic over the line to be abandoned.

We are further satisfied that the earlier traffic figures represent operations over the Joppa Junction-Fayville Junction line only and provide a useful measure of the trend of declining traffic on the line.

Although the line needs some rehabilitative work, considering the past deferral of maintenance, we are unable to determine the extent of work required. We agree with the Administrative Law Judge that the applicant's estimates are unacceptable. They are based on upgrading to a standard that would permit operations at 49 miles per hour. (Transcript, p. 115.) Yet, a need to operate at that speed on this low-density line has not been established. Therefore, we have not considered possible rehabilitation costs in concluding that the line is a burden to the carrier.

We must compare the burden to the carrier of continued service with the adverse effects of abandonment on the shippers and local communities. While overall system profitability is one factor to be considered, it is not determinative. The cash drain from unprofitable lines can impair the carrier's financial stability over a period of years and cause erosion of service on all its lines.

We cannot require a carrier to continue a deficit operation unless (1) sufficient traffic to support the line may be expected, (2) an overriding public need for the service exists, or (3) other factors, such as the carrier's actions, militate against approval of the abandonment. Since there is no evidence of foreseeable traffic increases, our analysis will focus on the other two possible grounds for denial.

In considering the need for the service, we look first at Tammsco, Inc., the largest user of the line. Its facility in Tamms is located near the line of the Illinois Central Gulf Railroad Company (ICG). Applicant has offered to give Tammsco a segment of its industrial siding which connects with ICG. Tammsco does not feel this connection would provide it with long-term uninterrupted rail service. It complains that ICG has reduced service at Tamms to an "as needed" basis and has filed for abandonment of a portion of its line. In its system diagram map, ICG has not indicated an intent to seek abandonment of its Tamms service, though, and there is no evidence that the ICG service would not meet the shipper's needs. We find that adequate alternative rail service is available to Tammsco and that it would not be adversely affected by the MoPac abandonment.

The testimony at the oral hearing indicates that other users of the line would be inconvenienced and would incure higher transportation costs to truck their goods to (or from) nearby railheads. However, these adverse effects are not of such magnitude to outweigh the carrier's burden. We are satisfied that adequate alternate motor-rail transportation is available.

We turn now to the two factors the Administrative Law Judge found decisive. Neither supports a denial of the abandonment application. First, there is no basis for the assumption that, if additional equipment were available, the line would generate substantially more traffic. Secondly, our approval of the MoPac-C&EI merger, without specific routing conditions, served to eliminate the two restrictions which the Administrative Law Judge felt had been violated.

FINDINGS

We find that, subject to the labor protection enacted in and developed pursuant to section 405 of the Rail Passenger Service Act, the present and future public convenience and necessity permit abandonment by the Missouri Pacific Railroad Company of its line between Joppa Junction and Fayville Junction, Illinois.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

The parties are advised that this decision is administratively final under the provisions of section 17(9)(c) of the Interstate Commerce Act. Any further administrative appeal can be entertained only under section 17(9)(d) of the act which permits such an appeal only if the entire Commission finds that a matter of general transportation importance is involved, that clear and convincing new evidence has been presented, or that there exist changed circumstances which would materially affect the decision made herein. Such an appeal must be filed within 20 days of the date of service of this order.

COMMISSIONER CHRISTIAN, concurring:

As noted in the decision, I dissented from the order of February 6, 1978, which declined to permit protestants to serve interrogatories until after the submission of evidence under the modified procedure. I continue to believe that such interrogatories should have been permitted. However, after a review of the record, including protestants' requests for further hearing and cross-examination of applicant's witnesses, I am convinced that the failure to grant protestants' petition to serve interrogatories has not tainted the ultimate handling of this proceeding.

Protestants have not renewed their request for interrogatories. In addition, the only alleged factual dispute requiring further hearing concerns the possibility that bridge and interchange traffic over the line proposed to be abandoned was not properly accounted for. This allegation by protestants' witness lack evidentiary support and it was amply refuted by applicant's witness as noted at pages 3 and 4 of the February 16, 1978 order.

In view of the fact that protestants' legitimate need for further information apparently has been satisfied, I join the majority decision.

It is ordered:

1. If any person or government entity is considering an offer of financial assistance to enable the rail service to be continued, then it should promptly give notice that it is considering such an offer by certified mail to the carrier applicant and by first-class mail to all parties of record and the Commission in accordance with the notice of the Commission entitled "Procedures for Pending Rail Abandonment Cases," served March 31, 1976, and published on that date in the Federal Register, 41 CFR 13691, and such information shall be made available in the manner described therein.

2. Upon this order becoming effective, notice of the findings made herein will be published in the Federal Register and any offers of financial assistance must be made within 15 days from the date of that publication.

3. Subject to the conditions set forth above, an appropriate certificate of abandonment shall be issued, and the applicant shall not effect any abandonment or discontinuance of service prior to the effective date of such certificate of abandonment.

4. This order shall be effective 20 days from the date of service.

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DECISION

NO. AB-19 (SUB-NO. 27)

BALTIMORE AND OHIO RAILROAD COMPANY ABANDONMENT BETWEEN FLORA AND SANGAMON JUNCTION, IN CLAY, EFFINGHAM, FAYETTE, SHELBY, CHRISTIAN, AND SANGAMON COUNTIES, IL

Decided June 8, 1978

By an application filed March 18, 1975, the Baltimore and Ohio Railroad Company (B&O) seeks a certificate permitting abandonment of that portion of its line of railroad between Flora and Sangamon Junction, from Station 3961 + 17 to Station 9415+49, a distance of approximately 103.29 miles, in Clay, Effingham, Fayette, Shelby, Christian, and Sangamon Counties, IL. By an initial decision, served November 11, 1977, the Administrative Law Judge denied the abandonment.

B&O and witness Craig E. Burroughs, et al., have filed an appeal and a limited appeals, respectively, to the initial decision of the Administrative Law Judge. Replies were filed jointly by the People of the State of Illinois, Illinois Commerce Commission, et al., and jointly by B&O (Chessie) Concerned Citizens Committee, Illinois Agricultural Association, FS Services, Inc., Illinois Grain Corporation, Christian County Farmers Supply Company, Effingham County Farm Bureau, Christian County Farm Bureau, and Clay County Farm Bureau.

Denying the abandonment, the Administrative Law Judge found that this matter should be consolidated with other proceedings involving the B&O line between Beardstown and Springfield, IL, and between Flora and Shawneetown, IL. He excluded the return on investment from the salvage value of the line in his computation of avoidable costs. He did not consider the B&O's estimated rehabilitation cost of $5,532,853 and average normalized maintenance cost of $666,416. He found that granting this abandonment would have had a significant affect upon the quality of the human environment. Finally, he found that the public convenience and necessity did not warrant the abandonment.

We disagree with the Administrative Law Judge's finding that it would be appropriate at this time to consolidate this proceeding for consideration with two other abandonment proceedings initiated separately by the B&O. The decisions in those cases are final and need not be disturbed.

The Commission's decision in Finance Docket No. 26745 concerning the line between Beardstown and Springfield, IL, was upheld by the courts on all issues including the consolidation issue which is raised here. ***People of the State of Illinois*** v. ***Interstate Commerce Commission et al.,*** No. 76-1561 (7th Cir. 1975), cert. denied 46 U.S.L.W. 3215 (October 3, 1977).

The Administrative Law Judge excluded the return on investment from the salvage value of the line in computing avoidable costs. Under section 1(18) of the act, applicable to abandonment applications filed before November 10, 1976, savings on investment from the salvage value of the line are benefits accruing from an abandonment which are not considered by the Commission in computing the loss from present operations. ***New York Central R. Co. Abandonment,*** 254 I.C.C. 745 (1944), and ***Chicago, B. & Q. R. Co. Abandonment,*** 271 I.C.C. 261 (1948). On February 5, 1976, Congress enacted section 1(a), superseding section 1(18), of the act concerning abandonments. Subsequently, the Commission issued regulations to section 1(a) which are applicable to applications filed on or after November 10, 1976. Under these regulations, the Commission in deciding the merits of an abandonment considers the savings on investment from salvage value of the line in computing avoidable costs, 49 CFR 1121.40. B&O filed this application on March 17, 1975, and thus, the Administrative Law Judge properly applied the old law to this case.

B&O contends that, in reaching a decision, the Administrative Law Judge failed to give proper consideration to (1) the estimated costs of rehabilitating the line—$5,532,853, and (2) the average costs of normalized maintenance—$666,416. Regarding the alleged cost of rehabilitation, we find it difficult to accept the claim that B&O deferred maintenance of this line because it recently indicated that it had no such "deferred maintenance" or "delayed capital improvements." ***United States*** v. ***Chesapeake & Ohio R. Co.*** 426 U.S. 500, 505 (1976). Concerning average normalized maintenance, the Commission will not consider an applicant's use of this factor as a cost in lieu of actual expenditures. *Northern Pac. Ry. Co. Abandonment—Mont.*, 348 I.C.C. 327, 337 (1974).

We next will consider the environmental issue. The Administrative Law Judge found that a denial of the abandonment would not cause a significant environmental impact but that a grant of the application would have had a significant environmental impact but that a grant of the application would have had a significant environmental impact. In his opinion, abandonment of line resulting in diversion of traffic from rail to motor carriage would generate increased fuel usuage, air pollution and roadway deterioration. Moreover, he believed that the motor carriers' handling of increased grain traffic under existing bridge load limits which precludes the use of 22-ton trucks would have a significant environmental impact.

Although diversion of traffic from rail to motor carriage would generate additional fuel consumption, the increase would have an insignificant environmental impact. In determining the significance of increased fuel use, the Commission has relied on analyses based on two alternative thresholds: (1) a 10-percent increase over the annual statewide diesel fuel use and (2) an absolute increase of 250 million gallons annually.[1] If neither level is reached, the Commission presumes that the increase is insignificant. Here, the potential increase of 470,000 gallons of diesel fuel would result in a 0.5-percent increase in the annual statewide diesel fuel use in Illinois (842,142,000 gallons).[2] Because the increase does not approach either threshold, the increase would have an insignificant environmental impact.

Roadway deterioration also will occur from additional traffic on the highway in the six counties. In this area, various State and Federal roads classified as principal through highways serve most of the involved stations on the line and tie into the Interstate System at Springfield, Altamount, and Edgewood. At present, heavy commercial vehicles use all these highways, which experience substantial traffic volumes. The abandonment would cause a maximum average of 16 additional vehicles daily which would be dispersed over this large, multicounty network of highways. According to the Illinois Department of Transportation, the additional traffic should cause no major problems. In our opinion, the increase in light of existing traffic conditions would have an insignificant environmental impact.

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[1] The 10-percent increase is presumed to represent the additional amount required to change existing distribution patterns of transportation. The 250 million gallon figure represents a 25-percent increase in the average refinery capacity (1 billion gallons annually) which is enough to require new refinery construction with attendant environmental impacts.

[2] This amount is calculated with figures listed in "Assessment of Environmental Impacts Associated with Railroad Abandonment Proposals." Interstate Commerce Commission, p. 6-10 (October 1976).

Some change in the air quality also may result from the increase in motor carriage and the concomitant decrease in rail service. In the six-county area, the air currently is subjected to substantial highway and rail emissions, and thus, any increased air pollution would have an insignificant environmental impact.

The Administrative Law Judge indicated that the bridge load limits would preclude the motor carriers from using 22-ton trucks to handle the increased grain traffic. In the past, they have operated under these same constraints and, in our opinion, their handling of increased traffic over these bridges should not present difficulty and would have an insignificant environmental impact.

In summary, insignificant environmental impacts would result from increased fuel consumption, roadway deterioration, air pollution, and traffic over the bridges with existing load limits. We also believe that, in absence of contrary evidence, these factors collectively would have an insignificant environmental impact.

Section 1(18) of the act requires the Commission to balance the inconvenience which shippers will experience against the benefits received by the railroad from the abandonment. *Colorado* v. *United States,* 271 U.S. 153, 168 (1926). The record indicates that 47 witnesses testified at the oral hearing in opposition to the abandonment. In considering the testimony, we have paid particular attention to the presentations of the 14 shippers that use the line: the nine elevators which consign grain, the four mills that receive grain and the receiver of phosphates. In addition, we have noticed that the largest shipper on the line, Ging, Inc., did not protest the abandonment. The shippers have alternative means of transportation at their disposal. In addition to B&O, the shippers generally have used more expensive motor carriage and have facilities located within a reasonable distance of other rail service. As an example, Staley gives B&O only 10 percent of its business.

From 1971 through July 1976, B&O handled an average of 2,160 cars annually over its tracks (19 cars per mile of track) ranging from a high of 2,803 cars in 1971 to a low of 1,656 cars in 1974. All of it was agricultural traffic consisting of grain and agricultural supplies. During this period, the shippers indicated two instances of B&O's refusal to arrange 65-unit car rates and one instance of its refusal to give transit rates. These infrequent instances of B&O's refusal to reduce rates for so-called "unit-train service" were reasonable considering the shippers do not make repeated volume movements and all movements are highly seasonal. Prospects of future traffic, all agricultural, are based on mere speculation. Although the Administrative Law Judge indicated that the line has traffic potential of 34,000 cars annually, the evidence fails to support his conclusion.

An estimate of the proposed abandonments effect upon applicant's operations shows that B&O in 1974 would have net operating income of only $2,454 and in 1975 would have incurred a net operating loss of ($18,437). Although B&O contends that in 1975 it would have had to handle 9,600 cars to breakeven, a financial restatement of its operations for 1975 (disregarding deferred maintenance) implies that its break-even point would have approximated only 2,275 cars. This amount is significantly higher than both the average number of cars handled during the 5 1/2-year period and the actual number of cars handled in 1975 (2,114). With costs increasing at a greater rate than income, future breakeven points would be even higher.

Weighing the inconvenience to the shippers from incurring higher costs of alternative transportation against the limited amount of traffic handled by B&O in the past and the speculative nature of future traffic (none of which is industrial in nature), and B&O's loss from operating the line, we believe that the burden on interstate commerce outweighs any inconvenience to the shippers. Therefore, we have granted the abandonment.

We find, subject to the conditions for the protection of employees imposed in ***Oregon Short Line R. Co.—Abandonment Goshen,*** 354 I.C.C. 584, 599-604 (1978), the present and future public convenience and necessity permit abandonment by the B&O of its line of railroad between Flora and Sangamon Junction, from Station 3961 + 17 to Station 9415 + 49, a distance of approximately 103.29 miles in Clay, Effingham, Fayette, Shelby, Christian, and Sangamon Counties, IL.

It is ordered:

(1) The decision of the Administrative Law Judge, served November 11, 1977, is reversed and the application is granted.

(2) In the event any person or Government entity is considering an offer of financial assistance to enable the rail service involved to be continued, then such person or Government entity should promptly give notice that it is considering such an offer by certified mail to carrier applicant and by first class mail to all parties of record and the Commission.

The applicant railroad shall, within 10 days after receiving notice that an offer of financial assistance is being considered, make available to the party considering the offer of financial assistance the information described under the heading "Railroads Seeking Abandonment Authority," which appears in the attached Notice of the Commission entitled "Procedures for Pending Abandonment Cases," served March 31, 1976, and published on that date in the Federal Register, 41 F.R. 13691 (the Procedures), and such information shall be made available in the manner described in the Procedures.

Upon this order becoming administratively final, notice of the finding of public convenience and necessity shall be published in the Federal Register pursuant to the requirements of section 1a(6)(a) of the Interstate Commerce Act, as amended.

Norwithstanding any notice that financial assistance is being considered that may have been given pursuant to the above ordering paragraph, any person or Government entity desiring to offer financial assistance to enable the rail service involved to be continued shall, within 15 days of publication in the Federal Register of the above-described finding of public convenience and necessity, send notification of such offer by certified mail to applicant railroad and the Commission and by first-class mail to all parties of record, and such notification shall include the terms and information described under the heading, "Persons Offering Rail Service Assistance," which appears in the Procedures.

If the Commission finds that a financially responsible person has offered financial assistance in accordance with the Procedures, the Commission shall postpone the issuance of a certificate of abandonment for such reasonable time, not to exceed 6 months, as is necessary to enable such person or Government entity to enter into a binding agreement with the applicant railroad to provide financial assistance for continued rail service or to purchase the rail line.

When the Commission is informed of the execution of any financial assistance agreement or acquisition and operating agreement, the issuance of the certificate of abandonment shall be postponed for such period of time as such an agreement (including any extensions or modifications) is in effect.

All correspondence to the Commission with respect to offers of financial assistance for the continued operations or acquisition of the subject line shall contain an appropriate reference to the subject proceeding and on the lower left-hand corner of envelopes containing such correspondence the following notation shall be typed in boldface "AB-RSCP."

Subject to the conditions set forth above, an appropriate certificate of abandonment shall be issued, and the applicant shall not effect any abandonment or discontinuance of service prior to the effective date of such certificate of abandonment.

(3) This decision shall be effective 30 days from its date of service.

By the Commission, Division 1, Acting as an Appellate Division, Commissioners Brown, Gresham, and Christian. Commissioner Gresham would grant the abandonment, subject to the ***Burlington*** conditions, for the reasons noted in ***Oregon Short Line, supra,*** at 597. In all other respects, he concurs with the majority.

The statement of facts, conclusions, and findings, decided **November 2, 1977, of Administrative Law Judge Robert E. Joyner,** follows:

Public convenience and necessity found not shown to permit proposed abandonment of Baltimore and Ohio Railroad Company between Flora and Sangamon Junction, IL.

Richard B. Allem, Esq., and *Albert W. Laisy* for applicant.

Henry E. Bruno, James F. Eberwine, Robert L. Graves, Winston C. Harbicht, Rodney C. Howard, Esq., *George B. Lee, Donald L. Lindsey, Gordon P. MacDougall,* Esq., *Kevin B. McCarthy,* Esq., *John W. McGinness, Patrick W. Simmons, R. L. Taylor,* and *Sam Witwer, Jr.,* for protestants.

John W. Giorgio for the Section of Energy and Environment for the Interstate Commerce Commission.

By application filed March 17, 1975, the Baltimore and Ohio Railway Company (B&O), a common carrier by railroad subject to part I of the Interstate Commerce Act, requests authority under sections 1(18)-(20) of the act, since repealed but here effective, to abandon a portion of its branch line of railroad between Flora and Sangamon Junction, from Station 3961 + 17 to Station 9415 + 49, a total of approximately 103.29 miles in Clay, Effingham, Fayette, Shelby, Christian, and Sangamon Counties, IL.

Notice of the proposed abandonment was served by applicant as required under the act and the Commission's regulations. Protests were filed by various public officials, shippers and receivers of traffic, and interested citizens. Prairie Trunk Railway, Trans-Action Association and Craig E. Burroughs were permitted to intervene as interested parties. The matter was referred to the Administrative Law Judge Samuel J. Smith for hearing and initial decision. Hearings were held in Effingham, IL, on January 24-28 and March 14-17, 1977. A decision in a related case on March 15, 1977, entitled *Prairie Trunk Railway—Acquisition and Operation*, 348 I.C.C. 832 (1977), made changes in the environmental significance of this proposal. Thus, the Commission's Environmental Unit felt it necessary to prepare a Supplemental Environmental Report. Further hearings were therefore held on June 20, 1977, in Effingham, IL, with a final day of hearing to comply with the requirements of the environmental process on August 23, 1977, in Washington, D.C. Post-hearing briefs were filed under the due date of October 20, 1977. Administrative Law Judge Smith left this Commission to become chairman of the Benefits Review Board, Department of Labor, after the hearings were closed and before briefs were filed. This matter was then referred to the undersigned for initial decision.

Matters not expressly discussed herein have nevertheless been duly considered. They have been found either wanting merit or insufficiently important to warrant extended discussion. Their discussion would not have altered the decision.

DESCRIPTION OF THE LINE

The segment proposed for abandonment is a branch line between Flora and Sangamon Junction near Springfield, a distance of approximately 103.29 miles, all in Clay, Effingham, Fayette, Shelby, Christian, and Sangamon Counties, IL. No passenger service is provided.

Stations located on the line include: Rochester, Berry, Breckenridge, Edinburg, Sharpsburg, Taylorville, Owaneco, Millersville, Pana, Tower Hill, Lakewood, Cowden, Beecher City, Moccasin, Altamont, Gilmore, Edgewood, Iola, and Louis. Other railroads serve Taylorville, Pana, Tower Hill, Cowden, Moccasin, Altamont, and Edgewood.

The Norfolk & Western Railway Company (N&W) serves Taylorville and Cowden; the Chicago & Illinois Midland Railway Company (C&IM) serves Taylorville; the Penn Central Transportation Company (PC) serves Pana, Tower Hill, and Altamont; the Illinois Central Gulf Railroad Company (ICG) serves Pana and Edgewood; and the Chicago & Eastern Illinois Railroad Company (C&EI) serves Pana, Moccasin, and Altamont.

The line crosses agricultural areas of the Central Lowland Plains, where feed grains and livestock are produced. Although farmland occupies the majority of the area, limited natural vegetation in the form of mosaics of bluestem prairie and oak-hickory forest is also present. Due to the predominance of agriculture, urbanization consist of small rural communities served by the subject line. Springfield, the Illinois State Capitol, has a population of approximately 100,000, is the only nearby major urban center, and is located less than 1 mile west of Sangamon Junction.

The line crosses many waterways that form part of the Ohio-Mississippi River dendritic drainage pattern. None are used for commercial navigation. The largest body of water crossed is the Kaskaskia River, 2 miles south of Cowden. This river is approximately 100 yards wide and is used for canoeing and fishing. Although no public recreational areas are directly involved, nearby facilities include Hidden Springs State Forest, 4 miles northeast of Cowden, Sandchris Lake State Park, 4 miles southeast of Edinburg, and various city parks in the Springfield vicinity.

The rural nature of the tributory territory results in relatively unpolluted air quality, except in Springfield. No other major urban areas with pollutant concentration, however, are located within 60 miles of the line.

The primary commodities hauled are farm related products, food and kindred products, especially, wheat, corn, soybeans, and related products thereof, and chemicals.

The line contains 169 public grade crossings, 11 railroad crossings, 39 bridges, 3 overpasses, and 40 culverts. Many of the bridges and some of the roads have posted limitations. There are many broken rails, worn down ties, and deteriorating ballast.

The highway network in the six-county areas consists of State, U.S., and Interstate routes. These highways tie into the Interstate system at Springfield, Altamont, and Edgewood, which are served by I-55, I-70, and I-57, respectively. Many of the roads in the surrounding areas are such that heavy truckloads cannot be endured.

The only developmental land use plan situated along the involved line is the 103.2 acre industrial park located at Pana. It is located at least 1/2 mile from the other rail lines serving Pana. At present, only the Essex Wire Company is located in the industrial park. There are no definitive plans for the remainder although the Pana Industrial Commission is actively soliciting new industry.

If acceptable to the local citizens and the State of Illinois, the B&O has offered to lease the right-of-way over the line for $1 per year so that rail service can continue in the area, aided by either State or Federal subsidies. However, if the line is not acquired by another party for continued rail operations or some other public use, the B&O would likely offer the acreage held in fee for sale at market value. Approximately 631.91 of the 1,115.27 acres are subject to reversion to adjoining landowners.

The B&O is seeking to abandon its Beardstown line northwest of Springfield (Finance Docket No. 26745), its Shawneetown line southeast of Flora (Finance Docket No. 26965), and its Decatur-Indianapolis line east of Decatur (docket No. AB-19 (Sub-No. 26)). The B&O has pursuaded the Commission to determine each of these cases separately. By decision served March 15, 1977, the Commission recommended that the B&O be allowed to abandon operations and that Prairie Trunk Railway be granted permission to acquire the southern segment (between Flora and Shawneetown) for short-line operations. In a separate order the Commission recommended that the B&O be allowed to abandon the northern segment. However, by order served August 18, 1977, in Finance Docket No. 27506, Chairman O'Neal stayed the order authorizing the Prairie Trunk Railway to acquire the southern segment of the Beardstown to Shawneetown line in order to protect jurisdiction of the Supreme Court in case No. 76-1700, ***Illinois, et al.*** v. ***I.C.C. and U.S.A.***, involving the approved abandonment of the northern segment of the B&O's Beardstown to Shawneetown line. A principal contention in this later case is that "I.C.C. failed to enter findings involving the effect that an abandonment of one segment would have on the viability of other segments, which includes the Flora-Shawneetown segment." (Traffic World-August 29, 1977, at p. 43.) It is the conclusion of the Section of Energy and Environment in its threshold assessment survey that the proposed abandonment in this application is not directly related to the proposals for abandonment of the northern and southern segments for these reasons: (1) the subject line has no stations in common with any other proposed abandonments; (2) any one of the three lines in question could continue to be served by the B&O, regardless of the ultimate disposition of the other two segments; and (3) the only local traffic in common between the subject line and the southern segment for 1975 consisted of 46 cars originating at stations on the southern segment, destined to Taylorville, a station on the subject line that is also served by N&W, representing approximately 5 percent of the total traffic generated by the middle segment. It states that if this application is approved, inbound freight to Taylorville from the southern segment could be shipped by rail even though the route would be more circuitous and involve utilization of other railways. In addition, the Section of Energy and Environment states that any bridge traffic currently handled on the line could continue to be shipped by B&O to other railroads over alternative routes. In its Supplemental Environmental Report, the Section of Energy and Environment once again confirmed its conclusion that the three segments of the Beardstown to Shawneetown line were unrelated and hence affirmed its finding that the abandonment of the Flora branch is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act.

IDENTIFICATION OF APPENDIXES

Attached as appendix I is a resume of the evidence of Craig E. Burroughs; as appendix II, a resume of other applicant's witnesses; as appendix III, a resume of environmental evidence; and as appendix IV and V a resume of protestants' evidence.

Financial considerations loom large in this proceeding, and contribute, as they must, materially to the ultimate decision made.

Therefore, the financial data have been analyzed and discussed in appendix VI.

APPLICANT AND ITS PROPOSAL

The B&O sets forth several reasons why it believes the Flora segment of the Beardstown to Shawneetown line should be abandoned. These include: (1) line in question generated an insignificant volume of traffic and there are no substantial prospects for traffic increases in the future; (2) there are extensive amounts of alternative transportation services available including both rail and motor carrier which can be utilized by shippers in the involved area; (3) trucking operations have already diverted a substantial part of the B&O's business along the line; and (4) the financial burden that applicant must incur to rehabilitate the involved line is not justified by the present and future traffic potential.

The B&O produced testimony (summarized in appendix II) through one of its witnesses, Donald P. Connor, director, Traffic-Research for the Chessie System, to show the amount of traffic transported by the B&O for its customers in recent years, as well as the alternative means of transportation, both motor and rail.

According to Mr. Connor, the amount of traffic that the B&O has transported has not been substantial enough to produce a profitable operation. It was brought out that for 1974 through 1976, approximately 70 percent of the traffic which moved over the entire 103-mile length of track actually moved over only 29.4 miles of it. Hence, Mr. Connor states that there are segments along the line where no shippers are served. Mr. Connor states that from 1973 through the first 6 months of 1976, the traffic originating and/or terminating on the line averaged less than 19 cars per mile of track per year. Set forth below are the carload figures from 1971 to July 1, 1976:

Year	*Originated/terminated cars*
1971	2,803
1972	2,363
1973	1,977
1974	1,656
1975	2,114
1st 6 months 1976	982

Mr. Connor further testified that there is an extensive amount of alternative transportation which can utilized. His exhibit 4, appendix I (copy attached to appendix II), shows that if the proposed abandonment is granted, rail service will still be available in the involved territory by ConRail, Norfolk & Western, Illinois Central Gulf, Chicago & Illinois Midland Railway Company, and Chicago & Eastern Railroad Company. In addition, team track facilities owned by N&W, I.C.G., and ConRail are located adjacent to the entire B&O line proposed for abandonment at such points as Springfield, Taylorville, Pana, Cowden, Altamont, and Edgewood. B&O also owns team tracks at Springfield and Flora which will continue to be available for use by B&O patrons if abandonment occurs and at which the B&O has offered to build a transfer bulk commodity facility for dry solid fertilizers to expedite the transfer of covered hopper cars of fertilizer into trucks for delivery. Mr. Connor points out that of the 19 stations involved, only 2, Taylorville and Pana, have populations exceeding 2,000 people and both are served by at least two or more railroads in addition to the B&O. As to the physical connection between the B&O with other railroads at each of the stations, some are connected and some are not.

B&O asserts that it is the abundance of trucking operations, along with the multiple alternate rail service in the area, which has diffused the necessary traffic volume required to sustain a profitable operation of applicant's 103-mile line. Mr. Connor lists the 27 motor common carriers serving this area in exhibit 4, appendix III. Although there are no motor carriers listed for Louisville and Iola, it was brought out that there are possibly some regular-route general-commodity carriers in that area.

In conclusion, Mr. Connor points out that if this abandonment is approved by the Commission, 65 percent of the carloads originating or terminating on the B&O line will continue to have direct rail service by either ConRail or N&W. This percentage is based on the fact that 1,368 cars of the total 2,114 cars that travel the route will continue to have direct rail service.

Applicant also presented evidence to show that the line is in poor physical condition and that rehabilitation costs will impose an unreasonable financial burden on the B&O. Mr. E. Q. Johnson, senior assistant chief engineer for the Chessie System, testified that the cost to rehabilitate the involved line by replacing the worn out track material including rails, ties, and ballast will amount to $5,532,853. Included in this estimate is the replacement of 67,000 defective crossties, which according to Mr. Johnson are not the total number of defective crossties in the 103-mile line. Based on a tie spot check made on a mile-to-mile sample basis in 1976, Mr. Johnson opined that 54 percent of the crossties were found defective, in accordance with the definition of defective ties as made by the Federal Railroad Administration (FRA). Mr. Johnson explained that at the beginning of each mile, five rail links totaling about 150 feet were examined to determine the percentage of defective ties. He testified that if the number of additional defective crossties were added to the 67,000, it would produce a total of approximately 166,860 defective ties. If his study had provided for the replacement of these additional 100,000 crossties, it would produce increased costs of approximately $1,500,000. Each tie costs approximately $15 to replace including materials, labor costs, equipment and work train costs. Another B&O witness, Mr. Richard G. Simmons, a railroad consultant with Suerdrup & Parcel and also an independent consultant to the FRA, testified that there are approximately 145,230 defective ties for the entire 103-mile line. It is Mr. Simmons' opinion that although it would not now be necessary to replace all defective ties, approximately 50 percent or 72,500 crossties need to be replaced at present in order for the line to have the capability of handling 100-ton grain cars at 25 miles per hour. On cross-examinatin, Mr. Simmons states that he did not make his inspection or judgment to conform to

FRA standards; that his inspection revealed rail and plates corroded from salt brine, rail anchors that are missing, joint bars that are worn and loose, bolts that do not lock, split railheads, broken end rails, mismatched rails, and short rails.

Mr. Johnson testified that the basic reason this situation has occurred is that all of the 103.29 miles of line being considered for abandonment, except for 0.06 of a mile, is at least 45 years old. The two segments that the B&O feels needs to be replaced at this time consists of 58.8 miles of 85-pound rail between 48 and 83 years old, and 30 miles of 90-pound rail between 60 and 61 years old. Mr. Johnson testified that both 85- and 90-pound rail is considered light rail and is no longer adequate for present-day service using heavier cars. Therefore, these rehabilitation costs include 100-pound rail. However, Mr. Johnson admits that at the time this application was filed the B&O had planned on using secondhand 112-pound rail, which at that time was less expensive than the 100-pound rail figures included in these estimates.

Mr. Johnson further testified that as a result of the age and condition of the rail, the B&O has been forced to impose 18 slow orders over 51.64 miles of the line as of January 1977. Of that 51.64 miles, speeds on 51 miles are restricted to the movement of trains at 10 miles per hour. Although Mr. Johnson admitted on cross-examination that the present operation of the line is safe with these speed restrictions, he also stated that if the rehabilitation program is completed as detailed in his appendix I, exhibit I, the present slow orders would be eliminated and additional slow orders would be prevented. During the second 6 months of 1976, B&O installed 13,000 new ties and approximately 20,000 secondhand ties in order to keep the track in service and prevent having to put additional slow orders on the track. These ties were not put at any particular segment but rather where tie conditions were worst. These ties reveal the program was not part of the B&O's rehabilitation program. At present, the entire line falls within FRA class I standards.

Another result of the poor condition of this rail, according to Mr.Johnson, is that the line in question has sustained rail surface failures, i.e., broken rails that occur as a result of actual physical breaks. Mr. Johnson stated that the B&O does not have an actual record of broken rails but that an estimate made by the division manager of engineering, based on interviews with the track supervisor and the track foreman, is that between 8 and 10 broken rails occur per week. Mr. Johnson testified that in 1976 there were six main-line derailments of which five were the result of broken rails.

On cross-examination, Mr. Johnson testified that it was only after the abandonment application was filed that a determination was made to downgrade the line from FRA class III to class II standards. Mr. Johnson admitted that the normalized maintenance-of-way costs which are the average annual costs needed to be spent to perpetuate the track at its level of condition so that deterioration does not occur as shown in exhibit I, appendix II, has never been performed by the B&O to that level, and that if the B&O has expended sufficient maintenance funds it could have maintained the line in class III condition. Mr. Johnson's estimate of annual maintenance-of-way costs totals $666,416, once the road is rehabilitated. Mr. Simmons testified that the 13 derailments on the line between February 21, 1974, and November 16, 1976, were caused by poor track conditions. He stated that this is a very poor record. On cross-examination Mr. Simmons testified that the B&O maintenance on this line within the past 10 to 15 years has not been very good. Mr. Simmons stated that he believes that safely and economically to handle the traffic involved, a rehabilitation program must be started. On cross-examination Mr. Simmons stated that after all of this work is done, the capacity of this line to handle tonnage will be unlimited. Thus, it was concluded by both of these B&O witnesses that the line needs extensive rehabilitation.

Mr. Johnson estimated that the net salvage value which the B&O would receive if the line is abandoned and the track material is salvaged amounts to $1,596,224.

Applicant presented its cost and profitability evidence through one of its witnesses, Mr. Richard. W. Bond, manager of the Chessie System's Profit Research (summarized in appendix II). Mr. Bond testified that as shown in appendix I to his exhibit 31, the traffic handled by B&O over the Flora to Sangamon Junction line for 1974, 1975, and the first 6 months of 1976, including overhead traffic, i.e., cars which are characterized as bridge traffic and cars which traverse off the line, total: 1974, 2,751 cars, 196,168 tons; 1975, 3,378 cars, 265,166 tons; and for the first 6 months of 1976, 1,528 cars, 117,875 tons. Although Mr. Bond states that these statistics show no significant change in the level of total traffic on the line, he admits that a 35-percent change in tonnage from 1974 to 1975 is an increase. Mr. Bond remains adamant in his opinion that a significant increase is one which has a greater bearing on the profitability of the line. He adds that the increases in the number of cars from 1974 to 1975 accounts for a substantial portion of increased cost of car repairs and related items as shown on appendix V, exhibit 31, and states that a very small part of such increases are due to unit cost changes.

Mr. Bond explains that during the past 2 1/2 years, the operation of the proposed abandonment line, including an adjustment to reflect the annual amortized cost of rehabilitation and normalized maintenance-of-way expenses (appendix II, exhibit 31, 1, 7), has resulted in annual deficits exceeding $1.1 million. In 1974, such deficit was $1,135,691; in 1975, $1,108,856; and in the first 6 months of 1976, $630,232. Total revenues on the line, including freight charges accrued and miscellaneous charges such as demurrage charges, are the following: 1974, $1,008,126; 1975, $1,366,124; and for the first 6 months of 1976, $588,511. In addition, Mr. Bond states that the total branch costs that would be avoided by abandonment are actual branch line expenditures for the most part, and where unavailable, system average unit costs applied to actual operations on the branch. These costs are: 1974, $725,545; 1975, $968,055; and for the first 6 months of 1976, $526,087. Mr. Bond admits on cross-examination that he has not used the tradional formula in computing net operating revenues by using a mileage prorate basis for the revenues and the 50-percent revenue formula for determining costs on the remainder of the system lines.

Mr. Bond further testified that if additional traffic similar to that already originating and/or terminating on the line in 1975 were to become available, it would require an additional 6,230 carloads to bring revenues to the point where costs are met but not exceeded. Hence, Mr. Bond concludes that three times more traffic than is presently being generated by shippers on the line is needed for B&O to break even. He testified that in 1975, 3,378 cars originated and terminated on the line; if this traffic were to increase, additional costs, including crew, locomotives, et cetera, would have to be incurred. Thus, he states that the true traffic needed by B&O to break even would in fact be greater than 6,230 cars. Mr. Bond states that in making his analysis he assumed that the only cost that would not vary would be the car ownership expenses.

Mr. Bond further determined that if a partial abandonment were to occur and applicant was requested to continue to operate the 38-mile segment between Sangamon Junction and Pana, B&O would incur an annual deficit of $487,760 which would require B&O to acquire an additional 4,645 cars of traffic per year so that it could break even. This would mean an increase from the 1975 level of 1,313 cars annually to 5,958 cars per year.

Mr. Bond admitted on cross-examination that this abandonment could have an effect on the profitability of other railroads. He explained that if the B&O traffic that is normally interchanged to other railroads no longer moves, revenues for the other railroads will be reduced depending on what the division of revenues between the other railroad and the B&O has been.

Applicant further states (Mr. Warren, appendix II) that if this abandonment is granted, shippers and receivers in this area can continue to receive the rail service they desire since B&O has made three different offers to donate trackage for a minimum legal consideration of $1 per year so that direct rail service can continue. The B&O states that it has offered Ging, Incorporated, at Cowden, IL, the Christian County Farmers Supply Company at Taylorville, and either the industrial park, the city of Pana, the State of Illinois, the involved county, the Chamber of Commerce, or any other industrial development or organization in that area, the right to lease B&O railroad tracks at Pana.

In conclusion, B&O states that it has affirmatively proved that its rehabilitation costs are so substantial that weighed against the present and future traffic potential on the line, such expenditures are unjustified. It further states that another reason such expenditures are not justified is that motor carriers have been diverting traffic in the involved area. However, a close examination of the record discloses that there was no presentation by the B&O of exactly how much traffic they believed had been diverted by motor carrier services. The only evidence that indicated diversion by motor carriers had occurred was through testimony indicating that the B&O had failed to deliver sufficient railcars to transport all of protestants traffic and hence, trucks had to be used to fill these gaps.

The B&O states that Illinois how has a statute authorizing subsidies of lines abandoned by solvent carriers. Financial contentions are disposed of in appendix VI.

ENVIRONMENTAL IMPACT

Prior to the hearing, applicant's proposal was the subject of an environmental threshold assessment survey prepared by the Commission's staff. Thereafter, by order served May 4, 1976, applicant was required to publish a notice in a newspaper of general circulation in Clay, Effingham, Fayette, Shelby, Christian, and Sangamon Counties, IL, advising that such threshold assessment survey had been made and based on that assessment, it was determined that an environmental impact statement need not be issued, inasmuch as this proceeding does not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*

In response to that order, comments on the staff's threshold assessment survey were submitted by protestants and responded to in an addendum to the threshold assessment survey dated September 27, 1976.

Additional information not previously considered in the threshold assessment survey was adduced in January and March 1977. The presiding Administrative Law Judge and the parties questioned the environmental ramifications of these new data and whether there were ground to reconsider the environmental staff's conclusion that the abandonment impacts were not significant within the meaning of NEPA. Hence on June 20, 1977, the hearing was reconvened in Effingham, IL, and the Supplemental Environmental Report of the Section of Energy and Environment dated June 2, 1977, was marked for identification as exhibit 68. Once again, the Section of Energy and Environment affirmed its opinion that the abandonment of the Flora Branch is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA. Counsel for the B&O Concerned Citizens Committee and counsel for the labor interests expressed a desire to cross-examine the person or persons responsible for the preparation of the report. Hence, the hearing was continued to August 16, 1977, for cross-examination but further continued to August 23, 1977, because Mr. Richard Chais, chief of the Section of Energy and Environment, could not be available at the earlier date. The hearing on August 23, 1977, was held in Washington, DC, to allow for the cross-examination of Mr. Chais.

Under these circumstances, and upon consideration of all pertinent evidence, it is concluded that this proceeding if granted would constitute a major Federal action significantly affecting the quality of the human environment because: (1) a diversion from rail to truck transport will cause substantial deterioration in the already poor roadways in this area, causing the counties to provide additional maintenance to keep the roads repaired for which they have insufficient funds; (2) the bridges in the surrounding area over which the trucks must travel have limitations that will not permit 22-ton grain trucks to move over them; (3) a diversion from rail to truck transport will cause a substantial increase in fuel and hence promote energy shortages as well as air pollution. In relation to this later point, it is concluded that accurately to calculate the impact in fuel consumption that diversion from rail to motor carrier transport will generate, it is imperative that the increased amount of fuel predicted to be used by motor carriers be compared with a similar type of fuel consumed in the State. In other words, it is inaccurate to compare, as did the Section of Energy and Environment, the potential increase in diesel fuel that would be used by trucks if this abandoment occurs, with the fuel consumption of Illinois highway users and hence conclude that since the potential increase in fuel by trucks of 470,000 gallons is only a minute part of the 5.3 billion gallons of gasoline fuel consumed during 1973 by Illinois' highway users that such an increase generated by the increased use of motor carrier transport is insignificant. Instead, the potential amount of fuel that will be used if abandonment occurs should be compared to the total amount of diesel fuel used in Illinois in a given year or number of years.

ISSUE

The ultimate issue is whether the present or future public convenience and necessity permit B&O to abandon. Under the provisions of the act, the Commission has the power to issue the certificate sought by the applicant, or to refuse it, or to issue it for a portion of the line, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require.

PROTESTANTS

Approximately 42 witnesses testified in opposition to the proposed abandonment, raising several major contentions.

RAIL SERVICE IS A PREFERABLE MODE OF TRANSPORTATION

Protestants collectively agreed that they preferred rail over motor carrier service for the transportation of their commodities, because: (1) rail transport is cheaper, (2) rail transport is more efficient in that larger quantities of commodities can be shipped at once and that the commodities are easier to unload from railcars; (3) rail transport generally provides more direct routing whereas trucks travel more circuitous routes, hence, wasting fuel and raising transportation costs; and (4) rail is far more practicable due to the large number of shipments of grain and the acute unavailability of trucks. Protestants state that if trucks had to be used exclusively for this traffic the shortage situation would be much more serious and further delays in pickup and deliveries would be incurred. In addition, farmers would lose money since grain would be unable to move in the peak season when all shippers need trucks. No protestant stated a desire to divert traffic to motor carriers. The testimony revealed that the only reason there has been an increased reliance upon motor carrier service in recent years is due to railcar shortages.

POTENTIAL HARM

The testimony generally of the protestants continually emphasized the acute harm that would befall the involved communities if this abandonment be granted. Repeatedly it was mentioned that without local rail service, the economy of the involved area would be affected because it would be very difficult to attract new businesses, keep the businesses already established in the area and establish a solid tax base. Dr. Wills, a protestant, discussed the crucial role that the railroad plays in the rural development effort. Many shippers mentioned that their personal investments in facilities on the B&O railroad line would be completely wasted if this abandonment were to occur since such facilities could not be put to any other use.

Several witnesses testified that the roads in the involved area could not physically sustain an increased amount of heavy truck traffic without causing serious harm to the road. Witnesses also testified that these local county governments could not afford to spend the amount of money necessary to perform the amount and kind of maintenance required if additional trucks travel these roads. This would mean an eventual breakdown and deterioration of the road system until it would not be fit to be used even for local traffic. The increased truck traffic would mean congestion on the roads and additional pollution. Many protestants testified that the only noncircuitous, practical route is on the B&O.

Many protestants felt that their communities could not afford to accept the B&O lease offer and that the State probably had insufficient funds to subsidize operations of the B&O railroad.

Four protestants that have facilities located on the B&O line between Flora and Shawneetown, IL, testified at the June 20, 1977, hearing in Effingham, IL, that if Prairie Trunk provides reliable, efficient, and frequent rail service, as well as adequate railcar supply and competitive rates, they will ship grain north to processors along the B&O line located in central Illinois at points such as Springfield, Taylorville, Decatur, and would also receive grain from points north of Flora. These witnesses state that if the B&O is abandoned they will lose the opportunity to develop this business.

In summary, protestants believe that due to substantial economic and environmental reasons, the proposed abandonment should be denied; that a grant would not serve the public convenience and necessity; and the forced continued operations of the B&O railroad would not impose substantial financial burdens on that carrier.

DISCUSSION AND CONCLUSIONS

In deciding whether to permit an abandonment, it must be determined whether the potential injury to shippers, receivers, and communities on the line outweighs the broader public interest in protecting interstate commerce from undue burdens. *Colorado* v. *United States*, 271 U.S. 153, 168-69 (1926). As in most abandonment cases, the Commission recognizes that certain hardships in varying degrees of severity may be imposed upon local interests. The point at which abandonment shall be considered justified is a matter of sound judgment determined by the circumstances of each case. *Chicago, M., St. P. & R. Co. Abandonment*, 184 I.C.C. 687 (1932).

The Commission's duty is not a determination of the property rights of shippers, or communities that may be inconvenienced or even forced out of business by abandonment, but rather to weigh present and prospective needs for the line and the benefits therefrom against the present and prospective burdens imposed upon interstate commerce. See *Confluence & O. R. Co. Abandonment*, 247 I.C.C. 399, 402 (1941). As further observed in *Colorado, supra* at 163, the ability of a railroad best to serve interstate commerce is lessened when it is required to make " *** excessive expenditures from a common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce." On the other hand, the courts have similarly held that public convenience and necessity are not determined by the Commission to protect the railroad, but to protect interstate commerce from onerous burdens which may affect the efficiency and ability of the carrier to perform its duty to the public. ***Village of Mantorville* v. *Chicago Great Western R.R. Co.***, 8 F. Supp. 791, 794 (1934).

In short, in administering the abandonment provisions of the Interstate Commerce Act, the Commission seeks to protect interstate commerce as a whole from burdens adversely affecting the efficiency and ability of carriers to perform transportation duties to the general public.

The resulting injury to a community, if abandonment is authorized, must be measured against the burden imposed upon the carrier by mandating continuance of operations. To be considered are: the use made of the line, the needs of the public for the service it provides, the traffic potential, the revenues that reasonably may be expected to accrue from continued operations, and the financial ability of the carrier to continue to operate over the line.

In evaluating conflicting evidence according to the criteria enunciated by the courts and by the Commission, it has been firmly established that the burden of persuasion rests with the proponent of abandonment to the extent that it must clearly demonstrate that the present or future public convenience and necessity permit the proposed abandonment.

Measured by any of the foregoing criteria, singly or collectively, on the basis of this record, it is the determination of this Administrative Law Judge that the B&O failed to meet its burden of proof with respect to the proposed abandonment of *103.29* miles of line between Flora and Sangamon Junction.

Although the B&O has stated that in the past 2 1/2 years it has been operating at an annual deficit of approximately $1.1 million, there is also evidence in the record showing that from 1974 to 1975 there was a 35-percent increase in tonnage handled on the line. There is evidence of demonstrating that the railroad has diminished service and in effect caused these losses. In two instances, the B&O refused to provide 65-unit car rates to two of the protestants. This traffic would have provided the B&O with additional substantial revenues. If the B&O had truly been interested in acquiring additional traffic and bolstering its profits, it would not have refused such traffic. Furthermore, there is evidence to show that the B&O realistically has the potential of acquiring an additional 34,000 carloads per year of traffic in the involved area. Hence, it is concluded that the B&O could have prevented these losses and could be operating profitably.

The estimated rehabilitation costs to replace the worn out track material including rails, ties, and ballast, in the amount of $532,853 will not be a financial burden on the applicant since the deterioration of the Flora line was caused either by the negligence or lack of reasonable care for the line by the B&O itself, a decision made by it and not by the public. Testimony presented through the B&O's own witnesses, Edward Q.

Johnson and Richard G. Simmons, established that the B&O had not performed an adequate level of maintenance and had let the line deteriorate to its present state. Mr. Simmons stated that the 13 derailments on the line between February 21, 1974, and November 16, 1976, were caused by poor track conditions and represent a very poor record on behalf of B&O. Mr. Simmons further testified that the B&O maintenance on the line within the past 10 to 15 years has not been too good. Mr. Johnson admitted that the normalized maintenance-of-way costs which are the average annual costs needed to perpetuate the track at its level of condition so that deterioration does not occur as shown in exhibit I, appendix II, have never been performed by the B&O that level and that if the B&O had expended sufficient maintenance funds it could have maintained the line in class III condition, instead of reducing it to class II.

As discussed earlier in the section on environmental impact, the abandonment of the Flora to Sangamon Junction is likely to have a significant affect upon the quality of the human environment. In this regard, it has been determined that a grant of this abandonment would cause substantial diversion from rail to truck thus generating a sizable increase in the amount of fuel used, generating increased pollution as well as causing deterioration of the roadway system due to the increased truck usage. At present, even the bridges in the area have weight limitations which preclude grain trucks moving over them. Many roads are posted. It is clear that in calculating whether the increase in diesel fuel consumed by added motor carrier service would have a substantial impact, the Section of Energy and Environment erroneously compared the amount of added diesel fuel that would be used with gasoline consumption by consumers in the State of Illinois. The comparison should have been made between the added diesel fuel that would be used due to increased motor carrier service to the total amount of diesel fuel used in the State of Illinois. If this latter comparison had been made, the statistics presented by the Section of Energy and Environment would have been valid.

This abandonment application of the Flora to Sangamon Junction line should not be considered apart from the other two related abandonment proceedings discussed earlier. It is clear that a prudent decision on the fate of this very important line can only be made by examining the impact of abandoning the entire Beardstown to Shawneetown line. It is shortsighted to allow the B&O to use legal maneuverings to segment the three parts of this proceeding and prevent a fair determination of whether the whole abandonment meets the public convenience and necessity test.

In applying the balancing test and weighing the interests of the shippers, receivers, and communities on the line with the potential burden on interstate commerce, it is readily seen that the shippers, receivers and communities on the line will be forced to bear a disproportionate burden if the abandonment is granted as compared to that which the B&O must sustain if it is forced to continue. The evidence clearly shows that the B&O line passes through the heart of the Illinois wheat belt and hence efficient and substantial rail service is especially important to sustain the economic vitality of this area. If rail service were discontinued, shippers and receivers would bear unnecessary inconveniences including delays in pickups and deliveries due to insufficient transportation services, rotted grain, loss of profits, and higher costs. Good rail service will encourage industry to maintain businesses in this area, and will help attract new businesses. It is more than likely that a grant of abandonment would adversely and substantially affect the economic stability of the involved area.

For these reasons, it is concluded that the public convenience and necessity does not permit the abandonment of the Flora to Sangamon Junction line and that this proceeding should be consolidated with the other two related abandonment proceedings so that the issues, environmental and economic, can be decided in a cohesive and orderly fashion.

ULTIMATE FINDINGS

1. Upon consideration of all evidence of record, this Administrative Law Judge finds that the public convenience and necessity have not been shown to permit the proposed abandonment by the Baltimore & Ohio Railroad of that portion of its line which extends between Flora and Sangamon Junction, from Station 3961 + 17 to Station 9415 + 49, a distance of approximately 103.29 miles, all in Clay, Effingham, Shelby, Christian, and Sangamon Counties in the State of Illinois.

2. Since this single decision does not change the existing status, this is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969. A contrary decision would.

3. This matter should be consolidated with the two related proceedings involving segments of the same line between Beardstown and Springfield and between Flora and Shawneetown.

ORDER

It is ordered, That the application of the Baltimore & Ohio Railroad Company for a certificate of public convenience and necessity permitting abandonment of that portion of its line of railroad extending generally between Flora and Sangamon Junction, described in this decision, be, and it is hereby, denied. In the absence of a stay or postponement, or the timely filing of an appeal, the effective date of this order shall be 20 days from the date of service.

APPENDIX I

By testimony of Craig E. Burroughs, the following facts are established

He is president of Prairie Trunk. In the summer of 1973, Prairie Trunk and the B&O Railroad reached an agreement to make Prairie Trunk a wholly owned subsidiary of Transaction Associates. Prairie Trunk subsequently filed an application for authority to acquire and operate the B&O line between Flora and Shawneeton, IL. The Prairie Trunk decision served March 15, 1977, granting this application is presently before the Commission on petition for reconsideration and an appeal in the Seventh Circuit Court of Appeals, in Chicago, has been filed.

He prepared appendix B, to the Prairie Trunk case, entitled "Prairie Trunk Projections as to traffic volume and gross freight revenues on Flora-Shawneetown line." The projections in appendix B were based on the premise that all of the railroad lines connecing with the Flora-Shawneetown segment, both northern and middle, would be in operation.

These projections were formulated in August 1973, but for purposes of this hearing he updated those projections and calculated the volume of traffic from the Flora-Shawneetown segment that could be expected to move over the Flora to Sangamon

Junction middle segment. He expects approximately 200 carloads of traffic to move off of the Flora to Sangamon Junction line, or points on the B&O beyond that line which would use the middle segment as a route to get the traffic to Prairie Trunk at Flora. Of this 200 carloads, 150 would be processed soybean products and the other 50 would be prepared food products. Approximately 150 carloads of traffic that originates or terminates on the Prairie Trunk Line, south of Flora, would move via the B&O line between Flora and Sangamon Junction north of Flora, some of it terminating on that line and some of it overhead to that line. Of this later traffic, approximately 50 inbound carloads to the Prairie Trunk line would be potash, 25 carloads would be soybeans, originating on the Prairie Trunk line and destined northbound to a point on the Flora-Sangamon Junction line, and approximately 75 carloads would be wheat originating on the Prairie Trunk line and destined to Springfield. An occasional miscellaneous carload, i.e. flourspar, would move over the B&O middle segment to northern Illinois or Wisconsin destinations. When specifically asked about the first year projection on appendix B that 2,500 carloads will move over the Flora-Shawneetown segment, he did not anticipate any significant movement of grain beyond what has been moving historically north over the Flora to Sangamon branch to either Pillsbury, Continental Grain or Staley, due to the inability to control the rate level to these destinations which the B&O serves. Such traffic will primarily fall into two catagories; (1) local truck competitive business from elevators south of Flora, which Prairie Trunk will transport to the port of Shawneetown for transloading into barges based on its ability to quote specific single-line, point-to-point rates that are competitive with the local truck business and; (2) traffic in conjunction with southeastern lines, i.e. the L&N and Southern based on Prairie Trunk's participation in three-car incentive, or Big John rates into the Southeast through specified arrangements with these carriers.

If this abandonment occurs, Prairie Trunk would be interested in purchasing the Flora to Sangamon Junction line. Such a proposal was made 4 years ago at a public hearing before the Commission and Prairie Trunk has had discussions in the past with the B&O concerning such an acquisition. The B&O has shown an unwillingness to have Prairie Trunk make such an acquisition for net salvage value or better, once the abandonment is granted. B&O is also willing to sell the Beardstown segment of this line to Prairie Trunk for net salvage value if such abansonment application, presently pending, is granted. It would not be of any benefit to Prairie Trunk to acquire the Beardstown segment if it could not also acquire the Flora to Sangamon Junction segment. The potential abandonment of both the northern and middle segments does not affect the viability of the proposed operation on the Shawneetown branch. Such abandonment would simply offer the Prairie Trunk the opportunity to expand its system by purchasing both segments.

No person representing the Interstate Commerce Commission from the Section of Engergy and Environment has contacted Prairie Trunk in recent months; Mr. Burroughs is the person who would normally be contacted in such a situation.

APPENDIX II

By testimony of Charles King, the followings facts are established

He is manager of the engineering department for the western division of the B&O which includes the 103-mile line between Flora and Sangamon Junction. Based on the inspection and study done by Mr. Robert Johnson relative to the proposed abandonment line, he inspected 100 ties beginning three rail lengths north of the crossing at five of the same locations that Mr. Johnson inspected. The photographs taken by Mr. King of these five locations were not admitted into evidence but were marked for identification by Administrative Law Judge Smith because Mr. King's photographs are only a sampling of Mr. Johnson's full study.

Mr. King found 19 defective ties at crossing 7073 whereas Mr. Johnson of Morrison-Knudsen only found 1; at crossing 7043 he found 12 defective ties; Mr. Johnson found none; at crossing 7050 both he and Mr. Johnson found no defective ties due to the replacement of all the defective ties in that area subsequent to a derailment; at crossing 7053, he found 29 defective ties whereas Mr. Johnson only found 1. On the basis of his own experience in inspecting the line, and on the basis of a mile-by-mile sampling made by a speedometer reading in May 1976, with 100 examples by the then track inspector, now track supervisor John Clevy, he has determined that 54 percent of all the ties on the 103-mile line are defective. Mr. King states that the use of the terminology failed versus defective ties is not different but just a matter of degree. On secondary defective ties there would be no disagreement as to their condition from professional examiners.

BY TESTIMONY OF EDWARD Q. JOHNSON, THE FOLLOWING FACTS ARE ESTABLISHED

He is senior assistant chief engineer of the Chessie System and former chief engineer of the Norfolk and Western Railway at Roanoke, Va. Based on his personal inspection of the line, he stated that the present cost of rehabilitating the line by replacing the worn-out track material including rails, ties, and ballast will amount to $5,532,853 as opposed to $2,811,980 as estimated in the original application for abandonment. (See exhibit I, appendix I. See exhibit 38 for an explanation of how each item in exhibit I, appendix I and II was calculated.) This increase is due substantially to inflation between the years of 1971 and 1977 as well as to several other miscalculated costs. Included in this estimate is the replacement of 67,000 defective crossties. According to Mr. Johnson these 67,000 crossties are not the total number of defective crossties on the 103-mile line. Based on a tie spot made on a mile-to-mile sample basis in 1976, 54 percent of the crossties were found to be defective in accordance with the definition of defective ties as made by the Federal Railroad Administration (FRA). At the beginning of each mile, five rail links totaling about 150 feet were examined to determine the percentage of defective ties. If the number of additional defective crossties were added to the 67,000, it would produce a total of approximately 166,860 defective ties. If his study had provided for the replacement of these additional 100,000 crossties, it would produce increased costs of approximately $1,500,000. Each tie costs approximately $15 to replace including materials, labor costs, equipment cost and work train costs.

The basic reason this situation has occurred is that all but 0.06 mile of the 103.29 miles of line is at least 45 years old. The two segments that the B&O feels needs to be replaced at this time consists of 58.8 miles of 85-pound rail, with an age of between 48 and 83 years, and 30 miles of 90-pound rail which is between 60 and 61 years old. Both 85 and 90-pound rail are considered light rail and no longer adequate for present-day service using heavier cars. These rehabilitative costs include 100-pound rail, however, at the time this application was filed B&O had planned on using second hand 112-pound rail, which was less expensive than the 100-pound rail figures included in these estimates.

As a result of the age and condition of the rail, the B&O as of January 1977, has been forced to impose 18 slow orders over 51.64 miles of the line. Of that 51.64 miles, speeds on 51 miles are restricted to 10 miles per hour, and the other 0.64 of a mile is restricted to 5 miles per hour. The present operation is safe with these restrictions. If the rehabilitative program is completed as detailed in Mr. Johnson's appendix I, exhibit I, not only would the present slow orders be eliminated but the placing of additional slow orders would be prevented. At present, the entire line falls within FRA class I standards.

Another result of the poor condition of this rail, according to Mr. Johnson, is that the line in question has sustained rail surface failures, i.e., broken rails that occur as a result of actual physical breaks. The B&O does not have a record of broken rails, but an estimate made by the division manager of engineering based on interviews with the track supervisor and the track foreman is that between 8 and 10 broken rails occur per week. In 1976, there were six mainline derailments of which five were the result of broken rails.

Definite rehabilitation efforts will have to be started within the next 2 years if this line is not abandoned, but the rehabilitation will have to be spread out over several years depending upon the availability of funds and materials. In the second 6 months of 1976, the B&O installed 13,000 new ties and approximately 20,000 secondhand ties in order to keep the track in service and to prevent having to put additional slow orders on the track. These ties were not put at any particular segment but rather where tie conditions were the worst. This tie renewal program was not part of B&O's rehabilitation program.

An estimate of the net salvage value for track material is $1,596,224.

It was only after the abandonment application was filed that a determination was made to downgrade the line from FRA class III to class II. The normalized maintenance-of-way costs are the average annual costs needed to be spent to perpetuate the track at its level of condition so that deterioration does not occur as shown in exhibit I, appendix II, have never been performed by the B&O to that level and if the B&O had expended sufficient maintenance funds it could have maintained the line in class III condition.

Mr. Robert Johnson's proposal to B&O to acquire trackage rights from ConRail and Missouri Pacific would produce a net loss and would probably not be approved by either railroad.

BY TESTIMONY OF DONALD P. CONNOR, THE FOLLOWING FACTS ARE ESTABLISHED

He is the director of traffic research for the Chessie System, including the Baltimore and Ohio Railroad Company (B&O). He presented exhibit 4 to show the stations along the involved line as well as other railroads serving each station and the nearest alternative railroad to each station. Upon abandonment of the B&O line, rail service will still be available in the territory by ConRail, Norfolk and Western, Illinois Central Gulf, C&IM, and C&EI Railroads. Team track facilities owned by N&W, Illinois Central Gulf, and ConRail are located adjacent to the entire B&O line proposed for abandonment at such points as Springfield, Taylorville, Pana, Cowden, Altamont, and Edgewood. B&O owns teams tracks at Springfield and Flora which will continue to be available for use by B&O patrons following abandonment of the line involved in this proceeding and at which the B&O has offered to build a transfer bulk commodity facility for dry solid fertilizers to expedite the transfer of covered hopper cars of fertilizer into trucks for delivery.

Mr. Connor points out that of the 19 stations involved, only two, Taylorville and Pana, have populations exceeding 2,000 people and both are served by at least two or more railroads in addition to the B&O. At the Pana station, there is no connection between C&EI and B&O, but there is a connection between the ICG and the B&O. At Cowden, there is a connection between N&W and B&O, and at Edgewood there is a connection between ConRail and B&O at Tower Hill, and at Moccasin there is no connection between C&EI and B&O. At Altamont there is no connection between C&EI and B&O.

Mr. Connor is of the opinion that, besides the availability of other carriers, there is an abundance of trucking operations which has already diverted a substantial part of the B&O's business along this line. Appendix III to exhibit 4 lists the regulated motor common carriers available at each station. Although there are no motor carriers listed for Louisville and Iola, there are possibly some regular-route general-commodity carriers in that area. Although Mr. Connor states that much of the available traffic can be shipped by truck, he does not know what the truck costs would be; but that in some instances they might be more costly.

Mr. Connor believes the inadequate traffic volume that the B&O has had is not substantial enough to produce a profitable operation. For 1974, 1975, and 1976, approximately 70 percent of the traffic which moved over the entire 103-mile length of track actually moved over only 29.4 miles of it.

From 1973 through the first 6 months of 1976, the traffic originating and/or terminating on the line has averaged less than 19 cars per mile of track per year. The following is a summary of the traffic the B&O handled in 1975 for its customers:

Customer	Total carloads	In	Out
F. Goodman	19	---	---
Louisville Seed Company at Louis (Louisville)	161	---	---
Effingham Clay Service	49	10	39
F.S. Services at Louis	25	25	---
Brown Produce	76	2	74
Homann Grain Company	155	19	136
Altamont Wholesale	19	19	---
Luty Grain at Beecher City	5	---	5
Cowden Oil Company	1	---	---
Ging, Inc., at Cowden	less then 6 cars/week.	---	---
Mid-Illinois Farmer Co-op at Millersville	91	21	70
Mid-Illinois Farmer Co-op at Owaneco	91	6	85
Edgewood (patron unknown)	3	---	---
Christian County Farmers Company	14	14	---
Continental Grain at Taylorville	977	212	765
Livergood Grain at Sharpsburg	6	6	---
Mechanicsburg Farmers Grain at Edinburg	34	---	---
Ramsey Grain at Berry	11	---	11
Berry Fertilizer	11	11	---
Brandt Fertilizer Service	4	4	---
Kaiser Agricultural Chemical Division	20	---	---

There are segments along the herein involved line where no shippers are served whatsoever.

To alleviate the impact of abandonment, the B&O has offered to donate its tracks for $1 to shippers at Cowden, Altamont and Taylorville so that these shippers can continue to receive direct rail service from other carriers on those lines.

Upon abandonment of the herein involved line, if approved by the Commission, 65 percent of the carloads originated or terminated on the B&O line will continue to have direct rail service by either ConRail or N&W. This percentage is based on the fact that 1,368 cars of the total 2,114 cars will continue to have direct rail service. In 1975, B&O transported 934 carloads of traffic from the Taylorville station, of which 920 were for the Continental Grain Company. Since Continental Grain is located on the mainline of the N&W, Continental will still have direct rail service if this abandonment occurs. B&O handled 176 cars from the Altamont station for two shippers. A letter from the president of ConRail to the executive vice president of B&O states that upon abandonment of the B&O line, ConRail would serve the shippers at Altamont on a private siding. As to Cowden, IL, B&O transported 273 carloads for Ging, Incorporated, but B&O has offered to donate its track for $1 at Cowden to Ging so that Ging will have direct rail service from N&W at Cowden. The 920 carloads for Continental Grain at Taylorville, the 176 cars at Altamont, and the 272 cars at Cowden of Ging that will receive direct N&W service total 1,368.

It is Mr. Connor's belief that on balance, the rehabilitation that must be incurred in order to continue rail service on this line far outweighs the potential inconveniences, if any, that will be sustained by the shippers upon abandonment.

BY TESTIMONY OF RICHARD W. BOND, THE FOLLOWING FACTS ARE ESTABLISHED

He is manager of Profit Research by the Chessie System, and has prepared the cost and profitability study. Included in this study are the following: (1) Analysis of the traffic utilizing the line proposed to be abandoned (exhibit 31, appendix I); (2) A study of the net financial effect of the abandonment on the applicant (exhibit 31, appendix II) including the revenues accruing to the branch line traffic (exhibit 31, appendix IV) and the branch line costs attributable to that traffic (exhibit 31, appendix V), as well as the number of cars required on the line to overcome the deficit and "break even," make revenue equal to costs (exhibit 31, appendix III); (3) A study depicing the traffic, revenues and costs on the line from Sangamon Junction to Pana based on 1975 operations, revenues and costs (exhibit 31, appendix VII through XII); and (4) Information concerning revenues and costs accruing to B&O family lines, i.e., C&O and WM, from traffic moving over the Flora to Sangamon Junction line.

Mr. Bond clearly explained that the difference between the cost date as filed in the original application and exhibits and the cost revenue data as detailed in exhibit 31, are threefold: (1) The methodology used in the original application was the ICC/RSPO formula wherein average costs were spread over an inflated track-mile basis as compared to exhibit 31 where actual maintenance-of-way expenditures are used; (2) Earlier figures were based on the assumption that the B&O would retain and reroute overhead bridge traffic as opposed to its present position which is that such traffic will be lost; and (3) There have been several adjustments made in the later figures including the number of locomotive units on the line (two began to be used in 1975); the inclusion of flow through traffic to be lost in the event of abandonmdnt; the inclusion of some items, i.e. switching charges at Taylorville, increased locomotive unit costs as a result of more power on trains, and the cleaning of wrecks, that were not known before by Mr. Bond.

As shown an appendix I to exhibit 31, the traffic handled by B&O over the Flora to Sangamon Junction line for 1974, 1975, and the first 6 months of 1976, including overhead traffic, i.e., cars which are characterized as bridge traffic and cars which traverse off the line, totals: 1974, 2,751 cars, 196,168 tons; 1975, 3,378 cars, 265,166 tons; and the first 6 months of 1976, 1,528 cars, 117,875 tons. Although these statistics show no significant change in the level of total traffic on the line, a 35-percent increase in tonnage from 1974 to 1975 is an increase. His opinion is that a significant increase is one which has a greater bearing on the profitability of the line; that the increase in the number of cars from 1974 to 1975 accounts for a substantial portion of increased cost of car repairs and related items as shown on appendix V; and a very small part of such increases are due to unit cost changes.

In the past 2 1/2 years, the operation of the proposed abandonment line, including an adjustment to reflect the annual amortized cost of rehabilitation and normalized maintenance-of-way expense, as shown in appendix II, line 7, has resulted in annual deficits exceeding $1.1 million. In 1974, such deficit was $1,135,691; in 1975, $1,108,856; and in the first 6 months of 1976, $630,232. The total revenues on this line, including freight charges accrued and miscellaneous charges such as demurrage charges, are the following: 1974, $1,008,126; 1975, $1,366,124; and for the first 6 months of 1976, $588,511. The total branch costs that would be avoided by abandonment as shown in appendix V and line 2 of appendix II are actual branch line expenditures for the most part, and where not available, system average unit costs applied to actual operations. These costs are: 1974, $725,545; 1975, $968,055; and the first 6 months of 1976, $526,087. The average costs for movement of traffic on the B&O lines beyond the 103-mile branch, termed "off branch" costs, are shown on appendix II, line 3. These are: 1974, $518,527; 1975, $662,353; and for the first 6 months of 1976, $255,723. He did not use the traditional formula in computing net operating revenues by using a mileage prorate basis for the revenues and the 50-percent revenue formula for determining costs on the remainder of the system.

If additional traffic similar to that already originating and/or terminating on the line in 1975 were to become available, it would require an additional 6,230 carloads to bring revenues to the point where costs are met but not exceeded. Hence, three times more traffic than is presently being generated by shippers on the line is needed to break even. In 1975, 3,378 cars originated and terminated on the line. (See appendix I and exhibit 31 at page 6 to see how computation of the 6,230 figure is arrived at.) If this traffic were to increase, additional costs, crew, locomotive, et cetera would also be incurred. These costs he constructed by assuming that the only cost that would vary would be the car ownership expense. He opines that the true traffic requirement to break even would in fact be greater than 6,230 cars as shown in appendix III.

If a partial abandonment were to occur and applicant is requested to continue to operate the 38-mile segment between Sagamon Junction and Pana, an annual deficit of $487,760 would result. Such deficit would require an additional 4,645 cars per year to break even. This would mean an increase from the 1975 level of 1,313 cars to 5,958 cars per year.

This abandonment could have an effect on the profitability of other railroads; if B&O traffic that is normally interchanged to other railroads no longer moves, their revenues will be reduced depending on the division of revenues.

BY TESTIMONY OF I. J. WARREN, THE FOLLOWING FACTS ARE ESTABLISHED

He is director of real estate and Industrial Development with the Chessie System, testified as to B&O's trackage donation offers, possible lease arrangements to Ging, Incorporated, the value of the 103.29 mile corridor between Flora and Sangamon Junction and real estate development matters.

The B&O has made three different offers to donate trackage. The B&O offered both Ging, Incorporated, at Cowden, IL, and the Christian County Farmers Supply Company at Taylorville, IL, the right to lease B&O railroad tracks for a consideration of $1 per year for as long as such tracks are used for rail purposes so that each of these shippers would continue to have direct rail service from their respective facilities. If this arrangement were to materialize, Ging would have a direct connection with the N&W Railroad whereas the Christian County Farmers Supply Company would be able to connect directly with either the C&IM Railroad or the N&W. In the case of Ging, their representative, Mr. Soldner, seemed quite receptive to the idea but also wanted to acquire additional B&O owned land at Cowden. At present, Ging leases 22,710 square feet on a year-to-year basis from B&O for $250 per year. Although no conclusive figure has been arrived at, Ging is interested in buying approximately 120,800 square feet, for which B&O has quoted a price of $14,575. Mr. Soldner made his request for acquisition of this property after the abandonment application was filed. The response of the Christian County Farmers Supply Company to B&O's offer was one of appreciation but was never definitely answered. B&O's third offer is to donate the mile and one half of B&O track that would connect the 160-acre Pana Industrial Park to the ConRail line at Pana, IL, for a consideration of $1 with a long-term lease of the right-of-way with the lease contingent on being used for railroad purposes. B&O offers to donate it either to the industrial park, to the city of Pana, to the State of Illinois, to the involved county, to the Chamber of Commerce, or to any industrial development or organization in that area.

B&O has not contacted the C&IM to see if that railroad will voluntarily serve Taylorville. It was stipulated that B&O has not made arrangements with the N&W to serve Ging at Cowden. It is Mr. Allen's position that since N&W is already serving Ging and will not have to install a switch, N&W will be legally required to continue to serve Ging.

If these leases occur, the maintenance of the track and crossings would be the responsibility of the lessee.

Based on Mr. Warren's estimate, the fee simple ownership rights of the line are worth $860,000. The price ranges from $1,000 to $10,000 per acre depending upon whether it was a rural or an urban area. The line appraisal was a combination of both a B&O field and office evaluation. No wholly independent evaluation was made. A 1.5 assemblage factor that includes costs such as title search, recordation fees, and field checks was applied to the $2 million value of the fee simple plus reversionary interest. The 1.5 factor is generally accepted in rural areas; if the 57 percent of the total land reverted back to its original owners, as is a possibility, the assemblage factor might have to be readjusted since the reverter-type restriction is sprinkled throughout the line and hence would break up the fee simple segment. If the abandoned right-of-way were sold to the State Highway Department as he suggests in exhibit 11, Mr. Warren believes the State could condemn the reverters and would be left with a 103-mile assembled corridor.

The Christian County Farmers Supply Company, through their representative, Mr. Loren W. Proefrock, made an application with the B&O for a side track to serve property he was considering putting in operation at Millersville, IL. In July 1968, such application was withdrawn. Mr. Warren had no information concerning the Christian County Farmers Supply Company located at Pana, IL. Furthermore, in 1973, Mr. Wally Beatty of Mid-Illinois Farmers Co-Op discussed a possible facility at Pana, IL, with Mr. Harry Hinds of the B&O. However, such requests never reached either B&O traffic research department or the industrial development department.

With regard to the Pana Industrial Park, Mr. Warren only knows of one shipper, Essex Wire, that has inquired about locating in the Pana Industrial Park. Essex Wire did locate there.

Upon abandonment the involved 103.29 mile corridor could be used as a highway, pipeline transmission for oil, gas, or other similar type products, an electric transmission line corridor, or as a scenic bicycle or hiking trail. In Mr. Warren's opinion, there are alternative uses for this land; but the best one would be that which gave the B&O the fair market value of the corridor.

BY TESTIMONY OF RICHARD G. SIMMONS, THE FOLLOWING FACTS ARE ESTABLISHED

He is employed as railroad consultant with Suerdrup & Parcel, and also as an independent consultant to the Federal Railroad Administration. He made an inspection of the involved B&O line in March 1977 of random areas. After a sample crosstie examination of 100 ties in a row of 15 different locations, which in his opinion is representative of the entire line, he determined that 47 percent of the ties are defective. He explains that if there are approximately 3,000 ties per mile, this would mean 1,410 defective ties per mile or 145,230 defective ties for the entire 103-mile line. Mr. Simmons opines that although it would not be necessary to renew all defective ties at present, approximately 50 percent or 72,500 crossties need to be replaced now for the line to handle 100-ton grain cars at 25 miles per hour. He did not make his inspection or judgments to conform to FRA standards.

His inspection revealed: rail and the plates that are corroded from salt brine; rail anchors that are missing; joint bars that are worn and loose; bolts that do not have nutlocks; split head rails; broken end rails; mismatched rails; and short rails.

Mr. Simmons opines that the 85-pound and 90-pound rail should be replaced in a program extending over a 5-year period; rail fastenings and the plates on the 100-pound rail should be renewed; the entire line should be surfaced and lined; approximately half of the road crossings should be renewed completely or extensively repaired; and ballast lying on top of the ties should be removed by an out-of-face surfacing program.

He thinks Mr. E. Q. Johnson's estimates of needed rehabilitation work is reasonable, conservative and may prove to be too low. The 13 derailments on the line between February 21, 1974, and November 16, 1976, were caused by poor track conditions, which is a very poor record. B&O maintenance on this line within the past 10 to 15 years has not been too good. The level of needed maintenance is dependent upon tonnage and speed. To handle safely and economically involved traffic, a rehabilitation program must be started. After this work is done, the capacity of this line to handle tonnage will be unlimited. He does not know how much tonnage is handled annually on this line. In response to a hypothetical question on cross-examination as to whether extensive repairs need to be made, based on the premise that 2 or 3 trains move per week from Flora to Pana and from Sangamon Junction to Pana, Mr. Simmons replied that to continue operating the B&O line even at present conditions substantial repairs need to be made.

APPENDIX III

Commission's environmental testimony

Donald W. Babson, environmental specialist with the Section of Energy and Environment at the Interstate Commerce Commission, testified relative to the Threshold Assessment Survey (TAS) and related addendum, exhibits 55 and 56, that he prepared for this proceeding. The source of his information for the TAS is the B&O Railroad (See exhibit 55, table II) and Mr. McCarthy, the traffic manager of Continental Grain, located at Taylorville, which is the primary shipper. Continental does not have direct rail access to the involved line, but is situated on the N&W line approximately 1 mile from the connection with the B&O at Taylorville. Continental uses the B&O for only 10 percent of its rail needs which is 800 or 900 carloads per year, and uses the N&W for the remaining 90 percent of the traffic. According to the TAS, Continental's traffic accounts for approximately one-half of the total traffic generated on the B&O line.

The TAS concludes that if this abandonment is approved, such action does not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321, *et seq.*, and that preparation of a detailed environmental impact statement is not required under section 4332(2)(c) of NEPA. Furthermore, Mr. Babson explains in support of this general finding, the Section of Energy and Environment found that associated environmental impacts to be insignificant based on the following conclusions: (1) seven of the major stations, which collectively generate approximately 70 percent of the involved traffic, will retain direct rail service from other raillines; (2) any resultant traffic diverted to motor carriers, approximately 16 trucks per day according to the environmentalists (see Addendum Comment 4), could be accommodated by area highways with only minor variations in fuel consumption, exhaust emissions, ambient noise levels, and truck related safety hazards; (3) no historic sites or major ecological effects are involved; and (4) the involved abandonment line (middle segment) is not directly related to other nearby B&O abandonment proposals, i.e. between Coal Shaft and Beardstown (northern segment) and between Flora and Shawneetown (southern segment), since the involved lines do not provide service to common stations and any of the three lines in question could continue to be served by the B&O regardless of the disposition of the other two segments (see Addendum, Comment (1) and Tr. 1151). Based on the data available at the time the assessment was made, the impact of the interchange of local traffic between the Shawneetown-Flora segment and the Flora-Sangamon Junction segment was considered by Mr. Babson who reiterates the response in comment (1) of the Addendum, exhibit 56, which states:

> The only local traffic in common between the subject line and the southern segment for 1975, as indicated by the B&O, consisted of 46 cars originating at stations on the southern segment which were delivered to Taylorville, a station on the subject line that is also served by N&W ***. If the subject application is approved, any inbound freight to Taylorville from the southern segment could be shipped by rail, even though the route would be more circuitous and involve the utilization of other railways.

There are no movements in the reverse directions and any bridge traffic currently handled on the line could continue to be shipped by the B&O or other railroads over alternate routes. Mr. Babson concedes that the Section of Energy and Environment should have taken into consideration what would happen if the worst situation occurred and the bridge traffic had to be handled by truck. It was stipulated that the loss of the overhead bridge traffic on the Shawneetown portion affects the viability of the Shawneetown section. His study primarily considered the local traffic, i.e., shipments originating or terminating on one of the three segments and originating or terminating on the other segment. However, flow-through traffic was only considered to the extent mentioned in footnote 1 to response 1 of the Addendum (exhibit 56). Flow-through traffic consists of traffic where there are no stops or interchanges on the Sangamon Junction to Flora segment.

It was brought out at the March 17 hearing that the Commission had recently handed down a decision in the Prairie Trunk Railroad case, Finance Docket No. 27506, served March 15, 1977, 348 I.C.C. 832, granting Prairie Trunk the right to acquire the Shawneetown portion of the line based on traffic projections in appendix B of that case, that the traffic over the Shawneetown branch would treble. In response to a question asked by Administrative Law Judge Smith regarding the possible environmental impact of an increase in traffic from Shawneetown to the herein involved proposed abandonment line, Mr. Babson responded that if the traffic generated by the Shawneetown segment is destined to points between Flora and Sangamon Junction, and this data is not presented in the TAS herein involved, reconsideration of the environmental impact might very well be appropriate. However, if the additional traffic generated by the Shawneetown segment is destined to Flora, or other points on the herein involved line, but does not traverse the line in question, such an increase in traffic would have no bearing on the environmental analysis. If a substantial amount of this increased tonnage of Prairie Trunk goes to Taylorville, a point to which a lot of other shippers haul grain over the Sangamon Junction line, the Section of Energy and Environment would most likely consider the impact of hauling grain to Taylorville without the existence of the involved line (middle segment), either by way of truck or over alternate rail routes. It would be necessary to know exactly where Prairie Trunk's shipments will be destined before determining the effect, if any, such an increase would have. Administrative Law Judge Smith makes the suggestion that this requires examining the underlying data to appendix B in the Prairie Trunk case.

Since it is brought out that Mr. Babson correctly made his environmental assessment based on the volume of traffic the B&O actually hauled over the Shawneetown segment in 1969, 1970, and 1971, and did not have an opportunity to evaluate the impact of the projected traffic movements over the Shawneetown segment revealed in appendix B of the Prairie Trunk case, it is determined by mutual agreement of the parties and Administrative Law Judge Smith that the Section of Energy and Environment should study the new statistics presented by the Prairie Trunk case, as well as the record in this proceeding, and determine what environmental impact, if any, this new evidence bears on the herein proposed abandonment proceeding. (See 352 I.C.C. 451, 474 as to what happens if new facts become available which might affect environmental issues.)

Hence, Administrative Law Judge Smith continued this hearing for about 2 1/2 months so that shippers that expect to transport commodities via Prairie Trunk over the Shawneetown segment can testify and so the updated environmental study can be done. (See appendix B for summary of these witnesses.) Administrative Law Judge Smith stated that the continued hearing would be limited to two issues: (1) the environmental effect on this proceeding as a result of the Prairie Trunk decision; and (2) the effect that the Prairie Trunk decision has on revenue protection and viability of the Sangamon Junction line. Mr. McCarthy points out that the U.S. Department of Transportation filed a report recommending that the Government delay the implementation of the replacement locks and Dam 26 in Alton, IL. He states that all alternative modes of transportation must be considered. Mr. McCarthy suggests that transportation over the involved line may be important. Administrative Law Judge Smith directed Mr. McCarthy to give all relative information to the Section of Energy and Environment so that an analysis can be made if he would like this issue considered.

Administrative Law Judge Smith further points out that this new evidence on traffic potential is important in determining the railroad's deficit and the revenue potential of the involved line.

In conclusion, it is brought out that the Section of Energy and Environment does not consider total diversion of rail traffic to motor carriers a likely possibility if the abandonment is granted. Mr. Babson states that the attempt precisely to quantify the amount of diversion is impossible since any attempt to determine how much diversion will occur is speculative in nature and hence, it is impossible to pinpoint the actual environmental impact. It was also brought out that Mr. Babson only assessed the impact that 16, and not 50, trucks would have on the highway network. He did not have any information from qualified experts that the routes and rates of other railroads would apply to the seven major stations he alleges will retain direct rail service from other lines. He did not have information as to weight restrictions on certain bridges which the traffic would traverse and hence, only considered the effect truck transport would have on the total highway network. He did not take into consideration what impact a severe winter storm would have on these roads.

At the June 20 hearing, Administrative Law Judge Smith gave each of the parties an opportunity to comment on the supplemental TAS issued by the Commission's Section of Energy and Environment, dated June 2, 1977 (exhibit 68). A summary of each of the positions taken follows.

Mr. McFarland, representing the B&O Concerned Citizens Committee, with whom Mr. Graves concurs, testifies that his clients chose to rely on the environmental evidence earlier given.

Mr. McFarland points out that he sees several erroneous, unsupported and inconsistent findings in the supplemental TAS as follows: (1) The supplemental TAS underestimates by 23,508 tons, or 30 percent, the amount of overhead traffic per year that moves over the involved line. Mr. McFarland states that the supplemental TAS finds that 55,400 tons of overhead traffic per year moves over the involved line by assuming that 50 tons per year moved in each of the 1,100 cars of overhead traffic which is said historically to have moved over this line. In this regard, Mr. McFarland points out that Mr. Bond's Exhibit 31 shows that in 1975, the lightest year in which full year data were available, the line handled 1,112 carloads of overhead traffic, carrying 78,908 tons; (2) Although Mr. McFarland agrees with the Commission's use of the worst case scenario, he states that the Section of Energy and Environment has not used that method in determining the energy effect of the rerouting of the overhead traffic in this case. Mr. McFarland states that the supplemental TAS has found that 682 cars of overhead traffic will continue to move by alternate rail routes and that 426 of such cars will be diverted to truck. Mr. McFarland states that using the worst case approach to increased fuel usage as a result of a rerouting of overhead traffic using correct statistics, an abandonment will cause increased fuel consumption of approximately 70,000 gallons annually as compared to the estimates of increased fuel usage found in the supplemental report of 6,246 gallons. Mr. McFarland states that the supplemental report has in effect concluded that increased fuel consumption of 519,000 gallons annually, as a result of this abandonment is insignificant as compared to the 5.3 billion gallons of fuel consumed by Illinois highway users in 1973. Mr. McFarland believes this conclusion is shortsighted as well as contrary to the National Environmental Policy Act. Mr. McFarland states that the correct potential increased fuel consumption is at least 540,000 gallons annually.

Mr. MacDougall states that the supplemental environmental report is defective in many respects and requests a hearing for cross-examination of the Section of Energy and Environment or the furnishing by the section of additional data. He states that some of these deficiencies include: (1) Figures never used before, and needing identification of 1,108 carloads used on page 3 of the supplemental TAS differ from the figure used in the B&O's exhibit 31, appendix 2; (2) Faulty assumptions, i.e., that overhead traffic on the branch is moving between East St. Louis and Springfield (page 4 of supplemental environmental analysis); (3) Classification of a contradictory statement in the updated TAS to the effect that the initial TAS considered traffic moving between all three segments, and, therefore, considers that the traffic was of relatively low volume based on historic traffic patterns; the TAS did not consider the three segments based on the theory that the three segments were not physically connected; and (4) Failure to consider what effect increased truck traffic would have on the county and township roads in the middle segment.

Mr. Allen stated that there is evidence at present prepared by Mr. Bond at Mr. MacDougall's request, substantiating the fact that there is a very limited amount of traffic that moves between all three segments.

Administrative Law Judge Smith received the supplemental study, into evidence, marked as exhibit 68 but withheld ruling on its admissibility until a continued hearing could be held in Washington, DC, to provide all parties the opportunity to cross-examine the person who prepared it. This final hearing, at which exhibit 68 was received into evidence, was held on August 23, 1977. The following is a summary of that cross-examination of Mr. Richard Chais, chief of the Section of Energy and Environment.

In preparing the supplemental report dated June 2, 1977, he received the evidence adduced at the January and March hearing. In response to Administrative Law Judge Smith's question as to whether it omitted consideration of the effect increased truck traffic would have on the roads in this area, Mr. Chais stated that he agreed with the earlier testimony of two County Commissioners that the roads, primarily farm to market, are in substandard condition, are not made to handle heavy truck traffic, and if they are subjected to increased heavy truck movements, wear and tear on these roads will be accelerated. Mr. Chais states that the utility of the roads will probably not be destroyed but traveling over them will be more inconvenient for the motorist. He further states that the key issue is economic as opposed to environmental since obtaining money to repave the roads appears to be difficult. He could foresee an increased safety risk if the roads continue to deteriorate and are not repaved. However, he did not specifically study safety problems; he believes these added risks are minimal. This area has ambient or residual traffic between 180 to 3,000 semitrailers on an average daily estimate depending on what segment of the line is considered. On bridges with weight limitations of 10 to 15 tons, grain trucks with weights as high as 20 to 25 tons would exceed those limitations.

Furthermore, common traffic that moved between all three segments of the Beardstown to Shawneetown line is a total of 68 cars, whereas the traffic level over the entire line is a total of 4,300 cars for 1974, 1975 and the first 6 months of 1976.

Hence, Mr. Chais concludes that the common traffic as compared to the total traffic is relatively low. Mr. Chais states that Mr. Burrough's projections of the common traffic that would flow between these lines is unclear due to inconsistencies in his testimony. Mr. Chais states that there is no indication that there will be a substantial volume of traffic moving north from Shawneetown.

When questioned by Mr. McFarland as to the source of the statistic in the supplemental report, 1,108 carloads of overhead traffic on the line, Mr. Chais states he received that figure verbally from Mr. Connor of the B&O; and this statistic appears to be reasonable. However, neither he nor his staff made any independent effort to confirm the reasonableness of this estimate. He did not make an independent evaluation of other threshold assessment figures. He explains that because this process is very time consuming and tedious, it is only done in rare cases where the impacts are considerably more controversial. Mr. Chais believes that in the case at hand, the impacts are controversial but ascertainable; that based on the total number of carloads, equated to ton miles which equals to energy consumption, he decides the outer limits of the volume of traffic involved and determines from these initial figures whether a detailed traffic study or just a preliminary look should be taken of the situation. Other factors such as the controversy, level of impacts, where the commodities might be routed, and the nature of the commodity, are all considered. Since grain is a homogeneous commodity there is less of a need to do a detailed study.

Assuming 100 percent diversion of all local traffic and flow-through traffic to motor carrier, there would be an increase of 540,000 gallons per year in fuel consumption, which is not a significant energy increase. There are two ways to analyze the environmental significance of energy impacts: (1) will the increase be more than 10 percent of the State's fuel consumption; and (2) what percentage of an increase is the added fuel consumption as compared with the annual capacity of an oil refinery, which is 250 million gallons. These measures are not in written from or contained in staff internal memoranda, but have been used informally for approximately 2 years. In this situation, Mr. Chais states that the worst case is 500,000 gallons which allows a substantial gap from one-quarter billion gallons. Hence, it was determined that even if the added fuel consumption reached 500,000 gallons, such increase would not be significant.

Upon questioning by Administrative Law Judge Smith, Mr. Chais agreed that the testimony of Peter Penner that it takes 53 percent more fuel to move a ton mile by truck than it does by rail is acceptable. However, Mr. Chais disagreed with Mr. Penner's conclusion that the diversion of some of the traffic on this line to trucks, if abandonment occurs, would result in an increase of approximately 200,000 gallons of gasoline per year. Mr. Chais states that Mr. Penner included indirect energy costs instead of direct costs. Mr. Chais states that he has never seen indirect energy costs used in any kind of proceeding. Mr. Chais states if the indirect energy cost were to be factored out, Mr. Penner's estimate would come to approximately 150,000 gallons.

In testifying as to the most direct alternative rail route for overhead traffic after abandonment via the ICG, between East St. Louis and Springfield, Mr. Chais states that no study was made to determine the economic feasibility of this rerouting. The issue of whether the shippers would actually pick this route was not addressed.

Mr. Chais concluded that he could have decided to consider all four of the B&O abandonments as a whole but he chose to handle them separately.

APPENDIX IV

Protestants' evidence

Plaford Davis is chairman of the Effingham County Board and has been since May 1, 1972. The primary responsibility of the County Board is to assure that the county is financially able to operate. The three villages involved are Altamont, Beecher City, and Edgewood.

The County Board is opposed to this abandonment for environmental reasons, and for economic reasons. The County Board believes that if shippers incur losses, these losses will ultimately mean higher costs to the consumer, hence spurring inflation.

Rex Walls is owner and manager of Rex Seed and Grain Company in Flora, IL. His company is served only by the B&O. Rex's facility at Flora is a 350,000 bushel grain elevator with a small fertilizer and seed processing plant.

If this abandonment occurs, B&O will still serve his company by yard switch to B&O's east-west line. However, Rex would no longer have access to the north part of the line. Rex's plant is located on the B&O tracks, but those tracks are not proposed to be abandoned in this proceeding. The B&O would not let Rex ship on the main line.

Rex's outbound traffic consists of corn, beans and wheat, all move by rail, wheat to Springfield, beans to Taylorville, and corn to Staley at Decatur. In addition, Rex ships fertilizer inbound from Streator, IL, by truck. The amount traveling by rail and truck outbound included: 1974, 6,766 tons by rail, 9,480 tons by truck; 1975, 10,938 tons by rail, 8,112 tons by truck; and in 1976, 4,627 tons by rail and 14,265 tons by truck. Rex did not have any inbound rail tonnage for the same period. If the B&O line is abandoned, Rex will not be able to reach Decatur, Taylorville, or Springfield with its grain; this would cause a loss of one-third of his business to trucking companies seeking to establish themselves as competitors of Rex.

The B&O would not give Staley transit rates at Decatur for Rex's corn because the B&O did not want Rex's traffic moving over the line and hence adversely affecting B&O's ability to win this abandonment case. He feels this was because Louisville was getting a lot of cars. However, the B&O gave Staley transit rates on corn from Louisville, which traffic moved over the B&O line.

The truck bid from Rex's plant to Taylorville ranges from 15 cents to 18 cents, if Rex does not have the trucker all year round. If he hires a trucker year round, Mr. Walsh pays 12 cents per bushel. The B&O's published rail rate from Rex's plant to Taylorville is now 8.4 cents per bushel whereas previously it was 18 cents.

Lee M. Rife is a marketing specialist at the Illinois Department of Agriculture. He believes that a strong rail system is necessary if Illinois is to remain a major producer, processor and seller of feed grain and soybeans. His purpose is to describe how Illinois grain is marketed and how rail versus truck bids affect the price to the farmer. Grain normally moves from the field and is stored either in on-farm or in commercial storage at county elevators. Grain moved to commercial storage is held either for the owners account or sold to the elevator, for cash or on a "delayed pricing" basis and becomes part of the elevator account. Grain stored either on-farm or at the elevator in a farmer's account will normally move through a county elevator later, although there may be instances of a sale direct to a processor or terminal.

Elevator managers price grain on the basis of a bid received from merchandisers located at terminal or processing points. These bids are a track-county station bid for rail grain and a separate bid for truck grain. Depending upon several factors, the truck bid will be higher or lower than the rail bid; the difference is that in a track-county station, the buyer pays the freight whereas in a truck bid the seller pays it. Mr. Rife points out in exhibit 40 that in addition to the 5 cents allowance which is the difference between the rail and truck bid, an additional freight charge is assessed against the elevator operator in accordance with the mileage tariff published by the Midwest Truckers Association for transit from the elevator to the processing destination. There is a 10-cent per bushel trucking cost, meaning that the farmer or the elevator will lost 5 cents per bushel. If the elevator were shipping only by truck, he would pass the 5 cents loss on to the farmer.

It makes a difference to the processor whether he receives grain by rail or truck since truck transport involves a greater investment, hydraulic lift-type systems, a scale, a pit and belt, whereas by rail, only a pit and belt are needed. The processor prefers to have inbound grain shipments by rail so that cars will be available for outbound shipments.

Based on the data by Dr. Walter Wills to the effect that the farmers produced 32 million bushels of corn within a 5-mile radius of the B&O line, Mr. Rife estimates that the farmers will lose approximately $400,000 if the B&O line is abandoned between Flora and Sangamon Junction, if 10 million bushels moves by the B&O at an average loss of 4 cents per bushel. Mr. Rife believes that this 10 million bushel figure is conservative. This $400,000 will go towards paying the truck cost. Ten million bushels are not presently moving by the B&O, but the B&O could effectively handle this much grain. Mr. Rife did not contest that rail rates were less than truck rates. The net effect to the farmer is that by using trucks he will receive 4 cents per bushel less. Inbound truck rates are cheaper in most instances than rail rates.

Mr. *Henry Bruno* is an employee of Sohigro Service, a division of the Vistron Corporation which is engaged in the production, distribution and marketing of fertilizer and fertilizer materials throughout the midwestern agricultural area including Illinois. It has 109 retail outlets in the Midwest to serve the farming community, of which 22 are in Illinois, including a retail fertilizer outlet at Millersville, IL, on the B&O. Not only does Sohigro have a total investment of $254,625 there, but the availability of rail service was a prime factor in its decision to establish the Millersville facility.

Its phosphate traffic is shipped either directly by rail from Florida or Louisiana to Millersville or by barge into Pekin (Peoria), IL, for storage, and then trucked to Millersville. Barge service is cheaper than rail but he did not know how the traffic charges by barge and truck combined would compare with shipping charges via the B&O. Transportation charges via the former might be less expensive than shipping via the B&O. Potash and urea do not move via barge but are transported directly by rail to Millersville. If the B&O line is abandoned such commodities must be shipped into Pekin or other outlets and then shipped for an additional motor carrier charge to Millersville. It is the additional transportation costs incurred by having to truck those products from Pekin to Millersville to which Sohigro objects. In 1976, increased transportation costs would approximately $24,332. If the potash or urea were shipped to one of Sohigro's other facilities nearer to Millersville, the truck costs of $8.35 would be reduced. ConRail and Illinois Central Gulf have team tracks at Pana, IL, only 6 miles from Millersville, but Sohigro cannot unload from team tracks since it does not have adequate trucks available at that point and its loads are susceptible, once opened, to deterioration.

Projected rail movements to Sohigro's Millersville, IL, plant for the next 4 years is: 1977—3,600 tons; 1978—3,700 tons; 1979—3,700 tons; and 1980—3,800 tons. This increase in tonnage and revenue should be an important factor in retaining the B&O line. (See exhibit 3.)

Mr. *Clarence Halsey* has served as a foreman of the line going out of Flora for 35 years and is union representative of the trackmen on this line.

At present there are 12 trackmen on the seniority roster in the territory being considered for abandonment. These 12 men work every chance they get. There will be an adverse effect upon employment if this abandonment is granted since these 12 employees will be dovetailed on another roster, which means that there is a good chance they will be out of a job.

There are two permanent gangs, one at Edgewood and one at Taylorville; each consists of three men and a foreman. There is a bridge gang with a foreman and five men working at Flora in the abandonment territory, but regional bridge gangs do the heavy work on bridges in that territory. There are no regional tunnel forces that do guniting on the bridges. There have been no regional rail gangs working within this territory for the last 4 years. There are machine operators, signalmen, a State safety inspector, carmen, a water station employee, and three depot agents in this territory.

Although the line needs service, surfacing of the track, in some instances lining, and replacement of some defective ties, in general, the track would either pass FRA inspection standards as is, or would pass Federal inspection without too much work being done. Surfacing and additional ties would be all that is necessary to operate this track at normal speeds. Mr. Halsey, although he is not qualified to comment as to the cost of the needed repairs, believes that if the abandonment is denied, the track could be made serviceable. He was not aware that 8 to 10 rail breaks per week were occurring.

Recently new and secondhand ties were placed in 70 miles of territory which, to the best of Mr. Halsey's recollection, is the first time since 1968 or 1969 that a tie gang had performed such repairs.

Donald L. Lindsey, chairman of the Illinois State Legislative Board, Brotherhood of Locomotive Engineers, states that the Brotherhood opposes the involved abandonment because it would affect adversely Brotherhood's members and families. Both the agricultural commodities of Illinois and coal is dependent upon rail transportation.

Leon E. Jones, an employee of the B&O Railroad for 34 years, presently works as a trainman and flagman for the B&O on the proposed abandonment line. He is vice chairman of the local lodge of the U.T.U., a labor organization. Prior to his present job, he was a rigger for the yardmasters.

He is quite familiar with the bridges, north of Flora over which his train operates. He works on the branch line between Flora, Pana, or Shawneetown. Of Bridges 103 to 160, only Bridges 121 and 130 have slow orders. There may be other slow orders leading up to and going away from other bridges, but there are no other slow orders on the bridges. There are no special instructions from the railroads regarding any of those bridges because they are defective. There are no slow orders imposed on the Kaskaskia Bridge No. 137. Since the derailment on June 16, 1976, there has been an increase in the number of slow orders.

Mr. Jones states that he can accomplish his work in the normal working day between Flora and Pana provided it is not too heavy; it takes approximately 7 1/2 hours on a dead run from Flora to Pana, a distance of 66 miles.

Mr. *E. C. Fitzgerald*, an employee of the B&O for 24 years, is local chairman for the U.T.U. 302 and is legislative representative. He worked on the line between Flora and Sangamon Junction for approximately 20 years, and is quite familiar with its operation.

Mr. Fitzgerald explained the car shortages on the B&O to shippers during 1976, of which he kept records and made an extensive study, summarized as follows:

Name	Outbound shippers	
	Shipped	Shortage
Rex Seed & Grain	62	188
Louisville Seed & Grain	184	141
Effingham Clay Service	58	82
Brown Produce Company	75	75
Homann Grain & Fertilizer	97	63
Lutz Seed & Grain	13	2
Ging, Inc	247	103
Mid-Illinois Farmers Co-op at Owaneco and Millersville combined	197	85
Livergood Grain Company	3	no information
Mechanicsburg Farmers Grain Company	22	10
Ramsey Seed & Grain	22	20

He has seen grain sitting on the ground at Sharpsburg and Edinburg waiting to be moved. Most of these shortages occurred during the peak of the grain shipping season. The shortage of grain cars during the peak season is a perennial problem.

The B&O has interlockers where its system crosses the tracks of another railroad except over the Missouri Pacific at Altamont where it has a manually operated gate. Otherwise signalling is done strictly by train orders.

At Edgewood there is no interchange between the B&O and ICG and that such is not possible since the switch has been spiked. The B&O interchanges with ICG on the mainline at Olney, approximately 22 miles east of Flora; also interchanges with ICG at Odin, IL, which is west of Flora. Because the switch is spiked, it is not possible to interchange traffic between the B&O and ConRail at Altamont.

The only B&O customer that can also be served by another railroad is Ging, Inc., at Cowden. Otherwise, all of B&O's shippers are captive shippers, according to Mr. Fitzgerald. The B&O does not directly serve Continental Grain. Mr. Fitzgerald is unaware that there have been approximatley 8 to 10 rail breaks per week resulting in substantial interference with train operations.

Mr. *Glen C. Francis*, an auctioneer and appraiser of real estate, has lived in Altamont for 73 years. He is familiar with the B&O line and the surrounding areas and has appraised real estate for inheritance tax and individual purposes. He has not appraised farmland in Sangamon County for has never appraised a consistent line of 10 miles. He has never testified in a public utility proceeding involving a highway, pipeline or electric transmission line. The most land he has appraised at one time is approximately 16 acres.

He does not believe that this right-of-way could be used for a highway due to the possibility that segments of the land will revert to their original owners. In the event a highway is planned for this area, the State of Illinois would have the right of condemnation. He asserts that it could not possibly be used for a pipeline unless all the cinders were removed since deterioration would occur. An electric transmission line corridor is feasible if the whole line is condemned. A bicycle or hiking trail would be a far-fetched idea and unpopular with adjacent farmers because of the litter that usually occurs on bike and hiking trails.

On the average, he believes that the fair market value of this land would be approximately $400 per acre. The latest farm valuation by the Department of Agriculture shows land valuations in Illinois range from $200 to $4,000 per acre. Appraisals are being made from $950 to $1,250. During the past year, farm land values have supposedly increased 41 percent which he believes is high. In the last year he auctioned a farm for $2,400 per acre, one for $1,010 per acre, one for $725 per acre, one for $675 per acre, and one for $265 per acre.

The value of the involved land is less than for farm land since the property is an abandoned railroad right-of-way, and not considered farm land until it is converted.

Herman Homann is manager and part owner of Homann Grain & Supply Company, a grain feed, and fertilizer business located in Altamont, a business served directly by the B&O Railroad. If abandonment is granted, the value of this business will decline since it would be deprived rail service consistently used for a number of years. This would force Homann Grain & Supply to establish another pattern of shipping and develop new sources for marketing new locations. This company would be deprived of a north-south railroad. However, if the abandonment occurs, Homann might possibly buy some B&O land.

Beginning in 1971 there has been a decrease in Homann's use of rail and an increase in its use of truck, attributed to railcar shortages and a reluctance of customers to buy commodities by rail except at a discount. The buyer designates the mode of transportation to be used. If this discount is too high, this company cannot afford rail and is forced to ship by truck. This company is geared to rail transport and would prefer to ship 100 percent of its commodities that way. Trucks cannot move as much volume without interferring with normal business and without incurring a lost of overtime expense and higher rates.

A summary of the tonnage Homann Grain & Supply shipped by B&O rail and truck follows:

Year	Rail		Truck
	Cars	Tons	Tons
1970	240	18,092	----------
1971	159	11,299	----------
1972	189	12,736	----------
1973	75	4,890	----------
1974	32	2,851	22,117
1975	134	12,720	32,034
1976	97	8,155	43,267
			(Some includes C&EI shipments to southeast.)
1977 (To January 26, 1977)	14	1,220	----------

A new corn processing plant is being constructed at Decatur, IL, by Archer-Daniels-Midland Company, to which rail service will be needed. A. E. Staley Manufacturing Company, also in Decatur, uses rail and will be needing more service.

When questioned about ConRail's offer to operate the B&O's tracks if this abandonment is granted, Mr. Homann stated that he would not be satisfied with such service due to ConRail's past inadequate service record.

Interstate Highway 57, termed by Mr. Homann as a good road, was completed on December 21, 1970, which is when rail transportation began to decline and truck transportation to increase. The witness denied that there is any connection between the two.

Mr. Homann was unaware of the rail freight service continuation subsidy payments that could be made to the B&O in order to sustain service.

Dr. *Walter Wills*, a professor in the Agriculture Industries Department at Southern Illinois University, Carbondale, is an expert in agricultural economics, specifically grain transportation.

Dr. Wills stated that there are three basic factors that determine the volume of grain that will move by any one form of transportation: (1) The cost of the transportation compared with that of the competitors; (2) the availability of the transportation; and (3) the dependability of service. The elevator operator is looking for the highest net price. He looks at truck versus rail service, billing procedures and any switches that will be incurred and make a difference in the total price. The buyer determines the mode of transportation and the routes to be used, at least, if the goods travel by rail. Availability of transportation simply means whether or not facilities exist so that the product can be moved. Lastly, dependability of service is whether the buyer can count on consistent service and arrival at destination.

Dr. Wills did a study of data received from the Illinois Cooperative Corp Reporting Service, a joint-Illinois-U.S.D.A. service, and calculated the total amount of grain grown by farmers within 5 miles of the B&O Railroad for 1975, which Dr. Wills believes is the total potential volume of grain that could be shipped by the B&O. He concluded that farmers sold 32 million bushels of corn, wheat and soybeans totaling 960,000 tons; that these farmers purchased 36,000 tons of fertilizer. If information concerning the total grain tonnage handled by the B&O were available, that number could be compared with the total tons available and the portion of the traffic that B&O participates in could be determined. (An earlier witness, Mr. Connor, testified that the B&O hauled 176,557 tons on this line and hence the trucks had two to four times more traffic in this area than the rail carriers.) Dr. Wills states that this later statistics does not mean that truckers want and are competing for the grain business because he believes it is possible that other railroads may be receiving some of the traffic.

Federal legislation, including the 4R Act, seems to encourage the development of economic activities in rural areas and favors a halt to the movement of people from rural to urban areas. The railroad is a very essential part of this rural development effort since it is an integral part of the agricultural distribution system. If there is no rail service to move grain, then grain would have to move by truck. Dr. Wills points out that many of Illinois' secondary roads are posted, meaning that during certain times of the year, especially winter, trucks with loads are not permitted on the roads. Since grain sells for its highest price during winter and if the grain cannot move even by trucks at this time, this would mean that grain sellers would incur a substantial loss of profits. Dr. Wills believes that although the railroads still have a substantial share of the grain business, they could have more if they wanted by providing more cars, reasonable rates and some assurance that the cars will arrive at their destination.

Rail rates on the B&O line to Decatur and Taylorville changed in the fall of 1976 making them favorable and making rail movement of grain a good mode of transportation. This change occurred because buyers persuaded the B&O to make the rates competitive. Increased volumes of corn and soybeans began to move to Decatur and Taylorville by rail. In Illinois, processors quote f.o.b destination prices for truck delivery, and f.o.b. elevator prices for rail delivery.

Anytime a farmer can get a nickel more per bushel, it can make a 25-percent difference in his net farm income based on data concerning net farm incomes for Illinois cash grain farmers. Dr. Wills computed adjustments in these net income figures depending upon whether grain prices are a nickel higher or lower.

In comparing rail with truck rates, Dr. Wills opines that truck rates are more expensive. But it was brought out that Dr. Wills does not know specifically what the truck rates are for the transportation of soybeans, wheat, and corn from the 19 stations along the involved line to Taylorville, Springfield, and Decatur as compared to the railroad rates to those locations.

Although there are other railroads serving this area, if the B&O line is abandoned, elevator shippers will lose access to certain favorable markets and, from the farmers point of view, will have less competition for their grain.

Lee Becker is plant manager of Effingham Clay Service Company, in Louisville, IL, a company only served by the B&O Railroad which has rail siding facilities adjacent to the B&O worth approximately $25,000 to $30,000. If abandonment of this B&O line occurs, these rail facilities will be of no good any more.

Effingham Clay Service ships corn, wheat, and soybeans from Louisville and receives plant food at its new 2,500 ton facility built in 1975 at a cost of $45,000. Its soybeans go to Taylorville or Decatur, its corn and wheat to East St. Louis. Its potash originates in Canada, its phosphates come directly from Florida, and its urea travels up the river by barge and is put back on the B&O at Kingston Mines, near Piken, IL.

Effingham Clay Service shipped 39 cars totaling 2,850 tons of grain outbound by rail in 1974. In 1975, it shipped 48 cars totaling 3,600 tons, and in 1976, 58 cars totaling 4,350 tons, in the same manner. Inbound, Effingham Clay Service received 29 cars in 1974 totaling 2,650 tons, 25 cars in 1975 totaling 3,255 tons, and 52 cars in 1976 totaling 4,800 tons. Inbound fertilizer comes from Flora with the exception of some potash and all of the urea which comes from the north.

In regard to B&O's proposal to establish pit facilities for fertilizer receipts from Flora, this company might or might not use them depending upon the arrangement offered.

If the B&O abandonment takes place, all of Effingham Clay Service's present rail traffic would have to move by truck. Present rail and truck rates are the same, but this is the first time such a situation has occurred in 15 years. Effingham Clay Service does not presently own any trucks.

If this company's rail volume had to move by motor carrier, there is no way all traffic could be accommodated. Effingham Clay Service would lose such traffic to a competitor. Effingham's elevator is plugged during harvest season and this company has difficulty is securing motor carrier service then.

Mr. ***Bill Ikemeyer*** is manager of Louisville Seed House adjacent to the B&O. This company ships wheat, soybeans, and corn primarily to Springfield, Decatur, and Taylorville via the B&O. Occasionally, it ships to Louisville, KY, and to St. Louis, MO. It does not receive commodities by rail. Louisville Seed House has its own private track and two load out spouts on the B&O line, and an elevator facility with a 250,000 bushel storage capacity.

In 1974, this company shipped 87 cars totaling 5,583 tons by rail; 1975, 156 cars totaling 12,497 tons; and 1976, 184 totaling 14,648 tons. It would take about 300 to 400 truckloads to move 100 railcars of freight. It is almost impossible to obtain trucks at harvest time. However, this company also owns three trucks, and occasionally ships by for-hire motor carriers. This company uses its own trucks primarily to deliver seed grain, corn, soybeans, and wheat, only when its elevators get plugged and during off season. In 1974, Louisville Seed House shipped 8,000 tons by truck; in 1975, 16,000 tons by truck and in 1976, 18,000 tons by truck. Percentagewise, there has been slightly more truck than rail since 1974 as compared to prior years. Rail proportions are increasing. If this company could have gotten additional cars, about 50 or 75, it would have shipped more tonnage by rail in 1976.

Rail and private carriage rates to Taylorville are just about identical. Although an abandonment would not increase these truck costs, reliance upon private truck carriage is impracticable since Louisville Seed House cannot afford to buy additional trucks. There are instances when rail rates are cheaper than private carriage costs, i.e., corn to Decatur. Rates charged by commercial grain haulers are higher than rail and such service is generally unavailable to the extent needed during harvest season.

If this abandonment is granted, Louisville Seed House will lose grain business since it would not be able to move as much volume by truck as it can by rail. This situation would affect the harvest, which has greatly increased in the past 5 years, as it would have to sit by the field until transportation is available. If Louisville Seed House could transport all of their volume by truck, it would cost approximately 7 cents per bushel more than by rail. Its present rail facilities valued at approximately $25,000, most of it for the siding, would be useless upon abandonment.

The B&O has never solicited this company's traffic. Even if a B&O salesman had called every week, the only way the B&O could have induced more business from Louisville Seed House would be if it had been able to supply more cars or reduce rates. If the B&O did not have additional cars in the peak grain season and if the B&O could not cut rates because they are losing money, then the B&O's soliciting traffic would have done no good.

John W. Rice is assistant traffic manager for F.S. Services, Inc., which, in 1969, made a $2 million investment in Illinois Grain Corporation and at the same time, made a commitment of certain management services. The corporate headquarters of Illinois Grain is the same as F.S. Services, Inc., and the president of F.S. Services is also the president of Illinois Grain Corporation. His job is helping Illinois Grain Corporation members locate facilities on various railroads. Mid-Illinois Farmers Co-Op is a member company of Illinois Grain Corporation and he has attempted to help Mid-Illinois locate a subterminal elevator site during recent years. The B&O site at Pana, IL, was chosen primarily because it has the best 10-acre site available. Mr. Rice told the B&O that Mid-Illinois needed a reciprocal switching agreement between the B&O and other rail lines serving Pana including Illinois Central Gulf, Penn Central, C&EI, and the Missouri Pacific before it could construct its facility there. He does not know where the predominance of the traffic would go from the Pana facility; this would depend upon where the best markets are. His letter to Mr. Beattie on April 12, 1973, stating that Mid-Illinois should not locate its facility on the B&O at Pana without having a commitment that if the line is abandoned Illinois Central Gulf would serve the plant facility was merely a prudent business decision. Mr. Connor from the B&O wrote him a letter stating that if the line is abandoned, it is Chessie's policy to offer the track to other railroads such as Illinois Central Gulf, Missouri Pacific, the Penn Central, or C&EI, but he denies that such a letter was a form of encouragement for building. He believes that B&O discouraged the building of the Pana facility by telling Mid-Illinois that it was studying abandonment of this line. Mid-Illinois needed either a written contractual commitment from the B&O or from some other carrier that they would continue to serve the elevator before building at Pana could begin.

Wally Beattie, general manager of Mid-Illinois Farmers Cooperative with its main office in Owaneco, IL, and a branch station on the B&O at Millersville, IL, testified that Mid-Illinois is served only by the B&O railroad. He states that Mid-Illinois has grain handling facilities, and iron-grain elevators with concrete storage tanks and a bulk dry fertilizer (anhydrous) storage facility at both locations. Its total grain storage capacity at both locations is 890,000 bushels. Its facilities are worth a quarter million dollars. If the B&O abandonment takes place, Mid-Illinois' Millersville and Owaneco facilities would be without rail. If abandonment occurs such facilities would be converted to truck receiving stations, approximatley $15,000 worth of equipment would become obsolete, and that conversion costs of approximately $35,000 would be incurred.

Mid-Illinois ships and receives commodities at both locations. Outbound it ships corn by rail to St. Louis, Decatur, Philadelphia, Baltimore, and Norfolk; soybeans, occasionally by rail but mostly by truck to Taylorville or Decatur; and wheat, predominately by truck to St. Louis. Inbound, it receives dry fertilizers from Florida and Canada and anhydrous from Missouri and from along the Illinois River.

It shipped outbound by rail in 1974, 181 cars, 18,085 tons; 1975, 149 cars, 14,760 tons; and 1976, 197 cars, 17,484 tons. Prior to 1974, the predecessor company shipped substantially less by rail. Its inbound shipments of fertilizer totaled in 1974, 16 cars; in 1975, 18 cars; and in 1976, 197 cars, of which 40 or 50 went to the East Coast for export.

Truck tonnages to and from both locations were: 1974, 17,500 tons; 1975, 15,500 tons; and 1976, 17,000 tons.

In 1973, Mid-Illinois, along with three other cooperatives attempted to develop a subterminal grain handling facility within the Pana industrial park on the B&O. This facility would have been a concrete elevator for 285,000 bushels with fast loading and unloading equipment and a 2,800-ton bulk blend plant. It was anticipated that 1,100 cars would be shipped from this facility if it could get a 65-unit car train. Mid-Illinois wanted a commitment from the B&O that it would get ongoing service before it would build. As revealed by a letter written by Mid-Illinois to the B&O and by Mr. Beattie's testimony, no commitment was made by Mid-Illinois that the B&O would get all 1,110 cars. However, because an arrangement could not be worked out with the B&O and because they were told by the B&O of the possibility of abandonment, Mid-Illinois is building a facility on the Missouri Pacific. The B&O did not categorically tell Mid-Illinois that it could not locate on the line.

Orville Niehaus, manager of Brown Produce Company, at Iola, IL, has the responsibility of buying and reselling grain for his company. Brown's facility at Iola is served only by the B&O. Brown has a storage facility that can hold 231,000 bushels and can load railcars on B&O leased property, in which it has invested $15,000 in facilities since 1974. These railcars loadout would be useless if this abandonment occurred.

By rail Brown ships corn, soybeans, and wheat from Iola to Springfield, Taylorville, and Decatur. It receives feeding limestone inbound by rail and Dupo, IL, near East St. Louis. Its liquid fertilizer is transported inbound by truck. Brown's rail shipments in 1974 for inbound and outbound traffic were zero; 1975, 75 cars, 6,443 tons; and 1976, 38 cars, 2,702 tons.

Brown ships some of its grain by for-hire motor carriers to Taylorville and Decatur. In 1974, it shipped 1,244 tons; in 1975, 3,046 tons; and in 1976, 8,046 tons by motor carrier. Mr. Niehaus attributes this increase in motor carriage to an increase in volume of shipments and a lack of available railcars. Although Brown had an adequate supply of cars for the soybean harvest, it only received five cars for the corn harvest in 1976. Brown could have used an extra 75 railcars and would have preferred to ship all by rail. Brown only owns one liquid egg truck which cannot and is not used for hauling grain. Motor carrier grain haulers have handled their traffic satisfactorily. If Brown lost all rail service Brown would not be very competitive due to the higher motor carrier freight charges, i.e., Iola to Taylorville by rail is 7.8 cents/bushel whereas truck charges are minimum 13 cents and maximum 15 cents/bushel.

If rail service was discontinued, Brown would need two trucks costing $60,000 to handle its present tonnage. Brown does not wish to acquire trucks since at Brown's present rate of growth those trucks would not be adequate to keep up with the volume of grain that will have to be shipped. A truck can hold only 750 bushels whereas a railcar can hold 3,100 bushels.

At the continued hearing of June 20, 1977, the testimony of Mr. Niehaus was stipulated in summary as follows. Brown Produce Company has entered into a verbal agreement with the B&O to lease additional land from the B&O at Iola, IL, for approximately $250 per year. Brown Produce intends to construct additional storage on that land consisting of two bins of 107,000 bushel capacity each at a cost of approximately $100,000. The storage bins are expected to be completed approximately 30 days after the B&O lease becomes effective. Brown Produce expects to generate additional rail traffic of approximately 30 cars annually to Decatur or Springfield due to these additional bins. Ging, Inc., at Cowden, IL, has applied to the B&O for a rail rate on corn from Cowden to Iola, IL, and if this rate is approved, Brown would receive approximately three cars of corn per week from Cowden for feed in Brown's chicken business.

In light of these considerations, Brown expects to ship and receive a total of approximately 150 cars in 1977, as opposed to the 75 cars in 1976.

It was also stipulated that had he been called for cross-examination Mr. Niehaus would have pointed out that the three cars of corn per week that he expects to receive would involve a short haul for the railroad of only 37 miles.

Robert L. Lighthall is assistant to the director of corporate transportation of A. E. Staley Manufacturing Company, which is engaged in the processing of corn and soybeans and the shipping of products manufactured from those raw materials. A. E. Staley has its major processing plant for both corn and soybeans at Decatur, IL. The corn plant, approximately 40 miles from Springfield, is served by the B&O on the Springfield, Indianapolis line; its soybean plant is served by the N&W and the ICG. The B&O gets approximately 10 percent of its business. Staley's Decatur plant receives shipments primarily of corn, sometimes a few cars of soybeans, from shippers located at B&O stations along that line. In recent years there has been a growth trend in rail shipments from almost all B&O local stations. For example, in 1974, there were 87 carloads shipped from the B&O stations; in 1975, 238 cars of corn and 29 cars of soybeans; and in 1976, 499 cars of corn and 1 car of soybeans. Mr. Lighthall expects that this trend will continue at a rate of 6 to 10 percent per year, especially since it has acquired an elevator at Sharpsburg. If the B&O were abandoned, Staley could get corn from shippers off any of the five railroads that serve its plant although not with as much flexibility as the B&O provides. With the exception of shippers at Flora, Cowden, and Altamont, the shippers at all of the stations along the line would lose their only rail service if abandonment occurs.

Staley bears the rail freight charges on all shipments from stations along the B&O line. If trucks were to transport all the grain the B&O moved for Staley in 1976, freight charges would increase $74,000, at 5 cents per bushel over the present rail costs. He asserted that in 1976, charges paid to the B&O amounted to $205,900. Transportation costs would increase if raw materials from Canada were routed via N&W thence to Decatur by a connecting railroad, by application of two local rates. From B&O origins, the B&O transit tariff now allows Staley to transport raw materials into Taylorville, manufacture and ship out at the balance of that rate to the southeastern market.

Ian C. Muir is traffic manager of the Taylorville plant of Continental Grain, one of the largest domestic processing soybean facilities. It receives only soybeans and ships outbound soybean meal, crude soybean oil, and hulls. Inbound shipments of soybeans originate within the entire central and southern portions of the State of Illinois. Outbound goes to all parts of the United States, east of the Mississippi River.

Continental Grain is physically located on the N&W. It has access to the B&O through reciprocal switching arrangements. In order to get its commodities over to the B&O, trucks are not necessary.

Continental Grain's inbound shipments of soybeans via the B&O for 1974 were 235 cars, 20,012 tons; 1975, 361 cars, 30,808 tons; and in 1976, 364 cars, 27,871 tons. Its outbound shipments via the B&O were 1974, 594 cars, 44,242 tons; 1975, 725 cars, 55,096 tons; and 1976, 873 cars, 67,794 tons. These statistics show that the rail requirements of Continental Grain on the B&O are increasing. Continental has both transit and nontransit rates in effect from B&O origins to its facility. Under its new nontransit rate, effective only on minimum shipments of 200,000 pounds and effective only on shipper-owned or leased equipment, Continental Grain could ship an additional 15 to 20 railcars per month or 180 to 240 per year via the B&O. In 1976, 238 cars of nontransit soybean meal were shipped from the Taylorville plant to various destinations in Alabama and Mississippi. These shipments travel via the B&O to Louisville, KY, where the cars are transferred to ICG for ultimate delivery. More refined products go out when Continental receives more soybeans. Traffic generated by these new rates is now being moved by truck, and will move via the B&O and N&W. There is no way Continental's tariff would permit it to route these shipments to these points if the B&O were to abandon service at Taylorville. The N&W would not be able to help Continental serve these ICG destinations and hence Continental would lose these 238 cars.

Continenal Grain gives the N&W as compared to the B&O three times as much freight. Traffic being tendered to the B&O is increasing and Continental needs to retain B&O service since in the past, N&W has turned down Continental Grain's request to establish rates out of Taylorville with the ICG.

Its inbound truck tonnages from stations located along the B&O for the same years were: 1974, 38,868 tons; 1975, 42,635 tons; and 1976, 56,323 tons. It had no outbound tonnage by truck.

Continental could not operate its Taylorville facility dependent upon truck transportation.

Jack Livergood is president and general manager of the Livergood Grain Company at Sharpsburg, a subsidiary of the A. E. Staley Manufacturing Company. His company has been located near Taylorville since August 16, 1976; has a total storage capacity of 540,000 bushels, of which 470,000 is concrete upright storage, 55,000 flat, and 15,000 wooden structures. Livergood Grain also has a storage shed that will handle approximately 8,000 tons of fertilizer. Since 1976, Livergood Grain has spent $2,000 to install a new shipping spout that is gravity fed to load hopper cars; if abandonment were to occur, such rail loading facilities would be useless.

The previous owner, Blount Brothers, primarily shipped its commodities by truck but the present ownership intends to use B&O rail service since rail is more conducive to shipping larger volumes. The condition that forced him at other grain elevators to use trucks has been the inability to obtain railcars. He has not, as yet, had much experience with the B&O.

Only the B&O serves Sharpsburg. Livergood Grain ships corn, soybeans, and wheat outbound. In 1976, it shipped three cars of grain via the B&O to A. E. Staley Manufacturing Company at Decatur. It plans to ship corn by rail in 1977. If the Livergood Grain elevator follows the pattern of the others, he anticipates that 14,000 tons of corn or 140 railcars will move to Decatur via the B&O. Mr. Livergood is unaware of the rail rate from Sharpsburg and is relying upon the past history of the other rail rates from his other elevators as the basis for the prediction that Livergood Grain will ship 70 percent of its corn by rail. The company will only receive inbound phosphates from Florida and Bartow, and potash from Kalium, Canada, by rail. If this abandonment occurs, that will have to be shipped by truck, at an additional $7.74 to $9.66 per ton over rail cost. This additional cost would be passed along to the farmer. On these inbound movements the freight would move by rail to Danville, IL, and then by truck from Danville, east of Urbana, to Sharpsburg. Sharpsburg receives approximately 12 cars or 1,200 tons of fertilizer per year. Therefore, the additional cost is for truck movement from Danville to Sharpsburg, which is 115 miles. The B&O's offer to construct a team track unloading fertilizer facility at Springfield, only 10 miles from Sharpsburg, would mean that Livergood Grain's inbound fertilizer shipments would need to travel a shorter distance.

John F. Dunn is a member of the Eighth General Assembly of the State of Illinois in the House of Representatives, and feels that the industrial park development in Pana, served by the B&O, would be adversely affected by abandonment.

In the upcoming months, the legislature will be considering development of coordinated statewide policy concerning abandonments. Hence, Representative Dunn urges that the Commission keep the B&O line in operation so that the State can determine whether this line fits into the overall plan. At present the State does not have enabling legislation to subsidize non-ConRail lines and he does not believe that funds for such non-ConRail lines are likely to be allocated in the near future due to the tight financial situation in Illinois.

Paul Hartke is sales manager for J. M. Schultz Seed Company at Diedrich, IL, and general manager of Cisne Seed Company. Cisne Seed is a small country elevator with the capacity to store 44,000 bushels and a 700-ton dry fertilizer plant. Cisne ships soybeans and wheat to Springfield, Taylorville, and Decatur. If Cisne Seed could not reach these markets by rail, it would have to resort to truck. Since it does not have many trucks, its volume of traffic would be cut approximately in half. If the volume were cut, profits would decrease so much that Cisne would have to go out of business. Only part of the fertilizer that Cisne receives travels via the B&O. Potash could go to Louis by Burlington Northern and then to Flora on the B&O's main line as an alternative route.

In the past there has been an increase in grain shipments by rail from Cisne. In 1974, Cisne could not get railcars making it necessary to close down the elevator. In 1974, Cisne shipped 11 grain shipments, 825 tons; in 1975, 30 shipments, 2,250 tons; and in 1976, 70 shipments, 4,823 tons. By truck, Cisne shipped: 1974, 187 truckloads, 4,218 tons; 1975, 328 truckloads, 7,383 tons; and in 1976, 156 truckloads, 3,939 tons.

E. V. Kiernan is manager of a grain and mill feed operation at Springfield and at Louisville for Pillsbury, and his responsibility includes procuring wheat for Pillsbury's mills and selling the mill feeds. Its plant at Springfield includes a mill that grinds approximately 7 million bushels of wheat per year and an elevator with a storage capacity of 3 1/2 million bushels. It produces flour milling, bakery mixes, cake mixes, frosting mixes, Sweet-Ten, and numerous other products. At Springfield it is served by the B&O, the ICG, the N&W, and is switched by the C&IM. Pillsbury receives inbound shipments of wheat at Springfield from origins on the involved line including Altamont, Beecher City, Cowden, Iola, and Louisville. Its Flora traffic should be considered bridge origin traffic since it is on the main line. Pillsbury could no longer receive shipments from the local B&O stations that are only served by the B&O, i.e., Iola, Louis, and Beecher City, if this line is abandoned. For those B&O stations that are off the line, i.e. Xenia, Enfield, Sumner, and Springer, the B&O would no longer be able to continue to receive rail shipments from those points if abandonment occurs because the rates to Springfield would be too high. This traffic would have to move to East St. Louis or into Cincinnati to get to Pillsbury's plant.

Pillsbury wants the B&O line to remain in intact so it can continue to receive the wheat shipments as delineated in its exhibit 21. The possibility is that some of its costs will be increased if abandonment occurs. He is unaware of truck rates from these stations and believes that it would be too speculative to try to determine now what Pillsbury's increased costs would be.

Roger Edmison, Clay County Superintendent of Highways, states that his duties include being the representative of the Clay County Board of Professional Representatives over the operation, maintenance, and construction of 135 miles of county highways and to provide advice to township highway road districts of which Clay County has 686 miles. On the county highways, all of the 135 miles except 22 are posted in the range of 10- to 12-ton load limits with the exception of certain bridges which are posted lower. These postings are applicable in the months of November through April. Structurally these roads cannot sustain loads exceeding these limits in accordance with the manual uniform traffic control devices effective in Illinois.

Approximately 70 of the 135 miles are classified as Federal and secondary highways (FAS Sections); the remaider is classified as farm-to-market roads or low-volume traffic roads. This later term means that the highways are 18 feet in width, with right-of-ways of 66 feet, and not built to maintain high-volume traffic.

Bridges are also under his jurisdiction. Of the 44 county bridges, 22 are on the FAS system and 20 are on the farm-to-market system, of which five are posted year round because of bridge failures and for safety reasons.

Louisville Seed and Grain Company is served by County Highway 3, for farm-to-market traffic, village streets, and U.S. Route 45. Louisville Seed is only three blocks, in satisfactory condition, from U.S. Route 45. These three blocks would not be able to handle added loads; added traffic would involve more traffic than the village can afford. Mr. Edmison believes that U.S. Route 45 is an inadequate road that would not sustain the semitruck traffic that is proposed if this abandonment occurs and there would be serious problems in having semitruck traffic in the Brown Produce area since it is on County Highway 7, which is not an improved FAS section. If this rail line were abandoned and it shipped 11,000 tons by truck, as based on 1976 shipments, County Highway 7 would have to be completely redone. Eighth Street where Rex Walsh's Grainery is located could not sustain additional truck traffic.

In conclusion, he opines that Clay County roads could not handle more truck traffic and the county does not have sufficient funds to maintain and repair such roads unless monies were supplied from Federal revenue sharing. At present, Clay County spends $281,000 per year for operation of its county highways, approximately $2,000 per mile. If used for truck transport the roads would deteriorate and become almost impossible to use.

Richard Brummer, a State representative in the General Assembly of the Illinois Legislature, represents nine counties and a portion of four other counties. As involved in this proceeding, he represents Clay and Effingham Counties, from Flora to Beecher City.

He believes that this abandonment would have an adverse economic impact on the area since in southern Illinois, its bulk commodities move more readily by either rail or barge. In addition, he believes that rail service more efficiently uses energy than truck.

Robert Allen, chairman of the Clay County Board of Supervisors in Iola, IL, testified that the B&O railroad is the only one that serves Clay County. The B&O stations involved in this abandonment that are located within Clay County include Louisville, Iola, and Flora.

The Clay County Board of Supervisors opposes this abandonment due to the adverse economic effects closing of the spurs would have on the county, such as increased cost to farmers of getting their grain to the national market, reduced taxes which support townships, municipalities, and school districts, reduced services to all people in the area including prospective enterprises that might consider a venture in Clay County, and reduced employment.

Cargill Nutrina, in the industrial part of Flora, receives soybean meal from Springfield on the spur that would be affected by the proposed abandonment. Mr. Allen is aware that the B&O does not propose to abandon the station at Flora itself.

Don Watson, administrative assistant to U.S. Congressman George Shipley, read a statement on behalf of Congressman Shipley into the record protesting this abandonment. The essence of this statement is: Congressman Shipley's District includes the involved counties of Christian, Clay, Effingham, Fayette, and Shelby. Congresman Shipley believes that the B&O's filing of three separate abandonment applications, with the ultimate potential result of dividing the Beardstown to Shawneetown line into three segments, prevents a careful evaluation of the total impact the proposed abandonment will have. He believes that the line from Beardstown to Shawneetown should be considered as a whole; that the shippers along the B&O line have received inadequate service and have been forced to find makeshift transshipping arrangements with trucks. Such arrangements have resulted in wasted energy, a decrease in alternative markets, and an increase in marketing costs reducing the farmers net individual profit.

John W. Neil is the mayor of Louisville, IL, a station on the line to be abandoned. Louisville's city council has authorized him to appear in opposition to this abandonment.

In summarizing the reasons for Louisville's opposition to the B&O abandonment, Mayor Neil listed the following reasons: (1) Louisville's industrial park, is located along the B&O tracks, and would like to keep the B&O's rail service so it can attract business. There are no buildings or industries in the industrial park at the present time. He knows of no industries that intend to locate in the park in the near future; (2) Louisville has four businesses, Louisville Seed, Effingham Clay Service, a lumberyard and an iron company that need the railroad. Louisville wants to be able to keep these as part of its tax base; (3) Louisville wants the railroad to stay in order to increase population growth; (4) Louisville needs the railroad due to the building of a Federal lake about 1 1/2 to 2 miles north of Louisville; and (5) the citizens of Louisville would prefer to have rail transportation used for the moving of commodities since trucks destroy streets and secondary roads by the weight of their loads and trucks make the streets unsafe for children.

Carl Brush is general manager of Mechanicsburg Farmers Grain Company, a co-op which has its main office at Mechanicsburg with its facility on the B&O railroad at Edinburg, IL, where there is a 650,000 bushel elevator. It has approximately 300,000 bushels of grain stored in the ground. It ships primarily corn, soybeans, and some wheat to the East Coast via the N&W. However, its Edinburg grain is forced to move to local markets which generates less revenue due to the rail facilities available. The grain that the B&O originates at Edinburg moves to Staley's and costs 2 cents more per bushel to ship by truck than by rail. Tonnages by rail and truck the company ships were: 1974, 490 tons by rail, 5 cars and 14,500 tons by truck; 1975, 2,800 tons by rail, 29 cars and 19,558 tons by truck; and 1976, 2,156 tons by rail, 22 cars and 34,314 tons by truck. When the co-op acquired the Edinburg facility, it intended to ship more by rail than was actually shipped in the past 3 years; in an attempt to implement this policy Mr. Harry Hinds of the B&O was contacted. Due to unforeseen difficulties with the B&O engineers, the proposal to operate 65-car trains from Edinburg never got off the ground. That proposal entailed shipping 6 to 10 trainloads per year, consisting of approximately 230,000 bushels per train via the B&O to Baltimore. The B&O would have derived substantial revenue from this proposal but took no interest indicating an intent to abandon the line. The N&W has 100-car rates and their facility is too small to be able to produce 350,000 bushels in 24 hours needed for 100-car rates. Therefore, the co-op would have to enlarge its facility to ship unit trains of grain on the N&W.

Ray Gilbert, mayor of Altamont, IL, was authorized by the city council to appear in opposition to this abandonment. The city of Altamont would not like to see Homann Grain, one of its largest shippers, transporting an additional 8,000 tons by truck on Altamont city streets as earlier testimony indicated will occur if abandonment takes place. Mayor Gilbert would like to see Homann transport less than the 43,000 tons of grain it now trucks. Homann Grain moves over eight or nine blocks of city streets to Route 40, a State highway. However, Homann's inbound movements of grain move over various streets, from all directions to the elevator, located three blocks west of the main business district. Businessmen view this inbound traffic more favorably than outbound. It has taken a costly rebuilding program to keep these streets in condition to handle present traffic.

The city of Altamont opposes this abandonment because it feels such abandonment will create an unfavorable business climate, business will not be encouraged to expand, the tax base will diminish, new industries will not be attracted, unemployment will increase, and the population will not grow.

Jack W. Johnson, county superintendent of highways in Effingham County, supervises the construction and maintenance of county highways paid for by county funds, and advises the Township Road Commissioners of the best methods of construction, maintenance and repair to the township roads. There are approximately 147 miles of county roads and 683 miles of township roads for which he is responsible. Approximately 14 of the county roads are built to Federal and secondary highway standards, the remainder being farm-to-market roads with 10-ton posted weight limits year round although primarily enforced from November through April. None of the Federal and secondary highway roads that are built to present standards are posted.

He is responsibile for the 37 bridges on the county highway system and the 105 bridges in the township system. Of the 37 bridges, 15 are posted in the range of 5 to 15 tons year round. In the township system, approximately 75 are posted in the same range year round.

Cities on the B&O line in Effingham County that would be affected include: Edgewood, Moccasin, Altamont, and Beecher City. In these areas, the county and township roads, mostly of oil and chip and oil and earth, as well as the city or village streets would be used for trucking. These roads cannot sustain this type of traffic and there would not be enough money to handle increased maintenance costs.

Robert Lowrance is executive secretary of the Effingham County Farm Bureau which represents the interests of the farmers of Effingham. In 1976, Effingham County farmers produced 11,989,137 bushels of corn, soybeans, and wheat valued at $37,988,846. Two grain elevators located in the western part of Effingham County, Homann Grain Company at Altamont, and Lutz Grain Company at Beecher City, which are served by the B&O, have a combined storage capacity of 1,540,000 bushels, that is 34 percent of the total storage capacity of 4,493,000 bushels of grain of all nine elevators in Effingham. Due to the importance of the storage capacity of such elevators any change which adversely affects the movement of grain from these two elevators will also have an adverse effect upon farmers relying on those elevators to purchase and store grain. As the B&O continues to serve elevators in Effingham County, the potential exists for grain to move to alternative markets, i.e., the southeastern United States, in export trade via ports on the East Coast and to grain processors in Taylorville, Decatur, and Springfield. He feels that motor carriers cannot effectively transport grain long distances and their rates are not competitive with railroads. Grain prices will become depressed if grain elevators cannot store the grain and then transport it after harvest season has passed. If there is insufficient transportation service, elevators eventually become plugged, unable to accept more grain, and the farmer must incur added trucking costs. The other alternative is for the farmer to gear up for on-farm storage; but this is no economically feasible. Rail service can effectively move grain in volume from elevator to market, thereby freeing actual storage space.

Harold R. Funderburk is employed by the Illinois Department of Business and Economic Development, which is primarily responsible for locating new industry in Illinois. He works with 600 firms a year of which approximately 20 percent require rail service and of which another 10 to 15 percent would like to have rail service. The department encourages Illinois communities to locate new industry where there is rail as well as nonrail service. The department is concerned that the proposed abandonment will undermine the economic potential of the industrial site at Pana. The city, county, and the Pana Industrial Development Corporation have spent approximately $300,000 to acquire and upgrade the site. The Farmers Home Administration, USDA, has granted Pana $50,000 for the installation of a sewage treatment facility in the park. Although the Pana industrial park still has potential for nonrail users, that potential will be greatly decreased if this abandonment occurs.

Mr. Funderburk was unaware that there is reciprocal switching at Pana and that the B&O has offered to donate its track at Pana for $1 with a long-term lease of the right-of-way so long as it is used for railroad purposes. This donation of track would allow the park to be physically connected to ConRail so that under reciprocal switching either ConRail could switch the cars out of the park and handle them on the ConRail line or switch the cars and interchange them at Pana to the ICG or the Missouri Pacific. If such a plan still renders a service to the Pana industrial park, he could not object to it.

Mr. Funderburk could not name any new company that wishes to locate a facility on the B&O line and ship railcars over that line, and knows of no rail industry that has located on the B&O line in 12 years.

John R. Meyer, city attorney of Flora, IL, since 1971, is authorized by the city council to present its opposition to this abandonment. Flora is on the north end of the south branch that runs toward Shawneetown, and on the south end of the branch that runs to Springfield. If abandonment occurs, Flora would no longer have service on the branch line that runs north.

Flora has an industrial park on the east side of the city that adjoins the B&O main line. Industries already there include Cargill, Southwire, MinWax, Valley Steel, Belltronics, and S&E Tool. There is additional room there for other industries. No other railroads serve Flora or the industrial park. Mr. Meyer does not have personal knowledge whether these industries have used the B&O, but believes Southwire and Cargill have.

Upon abandonment Flora shippers would either not have rail transportation or only circuitous routes, shippers would have to look to other types of transportation, and Flora would have a more difficult time attracting new industries to its industrial park.

He did not know if any of the industries in Flora's industrial park had used the B&O and stated that he was not acting on behalf of those industries.

John Peterson is executive secretary of the Christian County Farm Bureau which has approximately 1,700 member families. Total grain production in 1976 of the Christian County Farmers was 5 1/4 million bushels of soybeans and 23 1/2 million bushels of corn. These farmers are served by approximately 12 grain elevators, of which 5 (Sharpsburg, Edinburg, Taylorville, Owaneco, Millersville) are served by the B&O line proposed to be abandoned. Mr. Peterson does not know how much of this traffic was handled by the B&O. The Taylorville location is the only place where another railroad intersects. If the B&O is abandoned, elevators located on the line will lose the availability of moving their grain into commercial plants at Springfield and Decatur. Farmers need alternative markets so that when elevators are plugged grain need not remain on the ground. Most farmers cannot afford to purchase 12-ton trucks to move grain, and because of the expense, on-farm storage is not a feasible alternative. It would cost the farmers at least 5 additional cents per bushel to move grain by trucks, and trucks would destroy the highway system.

Charles Welles is general manager of the Christian County Farm Supply Company, which has a facility on the B&O line at Taylorville. Its Taylorville facility is primarily concerned with the fertilizer business and has a feed storage facility and fertilizer bulk plant. It has 1,200 tons of fertilizer storage space at an investment of $400,000. Christian County Farm Supply has approximately $10,000 invested in track. The company has a fertilizer plant in Kincaid, IL, 6 miles from Taylorville, that is served by the C&IM Railroad. It receives by rail phosphates from Florida and potash from Canada but does not ship outbound by rail. In 1974, Christian County Farm Supply received 22 cars, 2,200 tons, in 1975, 24 cars, 2,400 tons, and in 1976, 30 cars, 3,000 tons. The company receives about 300 tons of phosphates and potash per year by truck at the end of the season. Mr. Welles projects a 7-percent increase per year of inbound rail fertilizer shipments.

The N&W railroad, only 1 mile away from Christian County Farm Supply, and the C&IM, about 100 yards away, serve Taylorville. Mr. Welles state that he did not know if N&W and C&IM service is available through reciprocal switching. His company could not afford to maintain the B&O track on lease to the N&W which goes through the city of Taylorville. The C&IM in Christian County is primarily a coal hauling line. He has not asked the C&IM if it would handle inbound fertilizer traffic. If this abandonment occurs his company will have either to use truck shipments or haul fertilizer from other rail lines by truck to its Taylorville facility, either of which two alternatives will incur increased costs that will be passed on to the farmer. It would take 130 to 135 truck loads per year to fulfill its needs. Trucks will not able to satisfy Christian County Farm Supply's need for fertilizer because the fertilizer business is seasonal and competition for trucks at that time is so high that it would be very risky to run a fertilizer business on the basis that enough trucks will be available.

He does not believe that the establishment by the B&O of fertilizer storage pits either on the B&O in Springfield or on the N&W at Taylorville will be adequate for his company since questions, i.e., whether there will be a guaranteed supply of product and the financing of the whole operation are unanswered.

His company purchased in 1968 approximately 5 acres close to Pana to build a new fertilizer facility. Since this abandonment has been anticipated, plans have been dropped for this facility and other land has been purchased north of Pana in Morrisonville for a new facility on the N&W. This new facility will receive approximately 25 railcars of fertilizer per year and will serve primarily new clientele.

John N. McCracken, mayor of Pana, IL, appeared on behalf of the Pana city council and the Pana Industrial Commission. Mayor McCracken stated that without rail service the industrial park will not grow and the economic growth of Pana will be hampered. He believes that the city of Pana could not financially handle the maintenance of a mile of B&O track that it has offered to donate for a fee of $1 per year to connect the Pana industrial park with ConRail. He has not investigated what it would cost to maintain 1 mile of track or to acquire liability insurance over that mile.

Archie T. Walters is assistant general traffic manager of Allied Mills which is one of the leading companies engaged in the manufacture and distribution of animal and poultry feed. Prior to April 1, 1974, Allied Mills owned and operated the Soybean Meal Processing Plant at Taylorville, now operated by the Continental Grain Processing Division. Allied had great difficulty in securing cars to move over the B&O line. The N&W then had a substantial fleet assigned to Allied at Taylorville. There were many occasions when Allied would have liked to use the B&O but the rate level was substantially greater than that of the N&W. The B&O canceled a routing in connection with the export rates to the Gulf substantially reducing Allied's participation in B&O traffic. Allied did not protest cancellation.

While Allied Mills no longer has a major facility on the line proposed for abandonment, it does purchase soybean meal from Taylorville which is routed over this segment, which presently moves by the B&O from Taylorville with an interchange of cars to the ICG for direct movement to Allied's facilities at Soso, MS, and Jasper, AL. Rates applying on the 80-ton cars to Allied's plants at Soso and Jasper would no longer be available if abandonment occurs. Had Allied been required to pay the normal Taylorville rate, the rate that would be left if the proposed abandonment takes place, freight cost for the period May 1975 through March 1977 would have been increased $42,733 to Soso and $19,622 to Jasper. The B&O rate to Jasper is $10.84 per ton compared to the normal rate of $14.20 whereas the B&O rate to Soso is $12.92 per ton compared to the normal rate of $17.70. Allied could not be competitive if they had to use these normal rates. These 80-ton rates do not apply via the N&W, which would have to be used if the abandonment occurred. Via the N&W traffic would move with an interchange to the ICG at Decatur. Mr. Walters states that he has asked the N&W on several occasions to establish rates at the same level as these 80-ton rates but that N&W refused. He believes that if abandonment occurs, the N&W will be less likely to change rates because a competitive situation will no longer exist.

Mr. Walters explained that the differential, if any, between the truck bid and the track county station bid fluctuates and that hence, rails may or may not have an advantage. However, Allied prefers to use rail service because it is more predictable and unloading is more efficiently done.

Robert M. Johnson, employed as a project engineer for the Railroad Division of Morrison-Knudsen Company, Inc., criticized Mr. E. Q. Johnson's assessment of the condition of the track and the cost to rehabilitate and maintain the line as well as alternatives to reduce rehabilitation and maintenance costs and to recover the salvage value of the tracks involved.

This Mr. Johnson believes that only 12,500 ties need to be replaced in order for this rail line to be brought up to a FRA class II railroad instead of the 67,000 that Mr. E. Q. Johnson believed needed to be replaced. Mr. Robert Johnson's projections are based on an inspection tour involving random inspections made at 3- to 5-mile intervals out of 29 locations.

Mr. Robert Johnson believes that although E. Q. Johnson's normalized maintenance-of-way costs are reasonable, his rehabilitation costs are overstated. He states that many of the costs shown in E. Q. Johnson's appendix I are current maintenance, not rehabilitation or deferred maintenance costs. Mr. Robert Johnson states that the Chessie system engages in cyclical maintenance. If there is a 5-year cycle for changing ties and rail, and a 10-year cycle for ballasting and surfacing, and an annual cycle for bridges and road crossings, the costs Mr. E. Q. Johnson shows as $5,532,853 would actually consist of $1,700,000 in normal cyclical maintenance work, and $3,833,000 in rehabilitation as deferred maintenance work. Mr. Robert Johnson believes that the rehabilitation costs should be spread out over 3 or 4 or 5-year cycles, not constituting an immediate expenditure for the entire amount, and that since total rail cost is $3,900,000, if such costs are extended for 10 or 15 years, immediate rehabilitation costs would be reduced, with actual first year costs totaling $2,757,732.

Some of his ideas to reduce rehabilitation and mainteance cost as well as to recover the salvage value of the track removed include: joint use of facilities (trackage rights) with the Missouri Pacific between Altamont and Mocassin or with ConRail between Tower Hill and Pana, and removal of the unused yard and side tracks. Between 11 and 13 miles of track would be eliminated causing a reduction in rehabilitation cost of approximately 10 percent, totaling about $300,000. He further states that the B&O would be able to salvage 11 to 13 miles of line totaling approximately $150,000.

John Taylor, special assistant to Senator Adlai Stevenson, read a statement of Senator Stevenson into the record. Senator Stevenson believes that this abandonment should be delayed until section 802 and 303 of the Railroad Revitalization and Regulatory Reform Act of 1976 are implemented permitting a comprehensive review of the effect of this abandonment. Section 802, in part, requires the railroads to submit maps of all lines in their systems which are "potentially subject to abandonment." Section 303 establishes the Rail Public Counsel's office whose input, Congressman Stevenson believes, could be valuable.

Charles R. McGrew is executive secretary of the Clay County Farm Bureau, whose board of directors authorized him to appear. That board believes that this abandonment would have a detrimental effect on its membership which consists of 900 farmers of a total 1,160 members. Clay County is a depressed area with an average income of approximately $5,000. Four elevators along the B&O line account for over 50 percent of the total elevator storage capacity of Clay County. Because of the scarcity of bridges in the county, if elevators operating along the B&O trackage are removed, circuitous routing will be required for the farmer to get his produce to market in particular places in the county. Truck transport will cost the farmer an additional 5 cents per bushel.

Clay County produced approximately 7.4 million bushels of grain in 1975. Mr. McGrew did not know how much was transported over the B&O branch line.

Patrick Simmons, employed by the United Transportation Union (UTU) as an assistant State director of the Illinois State Legislative Board, testified that if the train from Springfield to Pana and from Flora to Pana were to be discontinued he does not believe that the B&O would be able to effect a savings in firemen's wages, due to the Mannion Training Agreement, enacted in 1972 which protects those on the job up until 1972, and guarantees a transfer to another fireman's position if their present job is eliminated. Unlike firemen, other workers, i.e., flagmen, conductors, et cetera, can get bumped if abandonment occurs. On cross-examination, it was brought out that although the B&O must keep the firemen on the payroll, the B&O is saving money since it has eliminated one job and is getting the firemen's services at another location.

George B. Lee is employed by the United Transportation Union as a State director. Mr. Lee confirms that under the national agreement between railroad management and unions, the employment of firemen can be gradually reduced over a period of years but that once the employment level reaches 10 percent it will be frozen. The railroads must employ a ratio of one fireman for every 10 engineers, but on the Shawneetown to Beardstown segment, nobody wants to be a fireman. If any of the firemen retained by the B&O in the Shawneetown-Beardstown district want to work in the Flora and Sangamon Junction line, they have the right to bid for the job.

Peter Penner, research assistant for the Energy Research Group, part of the Center for Advanced Computation at the University of Illinois in Urbana, has been engaged in determining the energy, dollar, and labor costs of many different forms of passenger and freight transportation in connection with a research grant from the National Science Foundation. He appears as a private individual consultant retained by the B&O Concerned Citizens' Committee to testify as to the energy impact, the change in energy cost to the State and the national economy due to changes in existing transportation patterns. His purpose is to determine potentially how much more fuel would be required if a large amount of the traffic now handled by rail were to be handled by truck.

He calculated the energy cost increase by taking the total ton-miles which the B&O hauled over the segment of the involved track for a year, and then calculated how much energy would be required to move that same volume by truck over a similar route. To the extent this rail traffic is not in fact diverted to truck, the figures will have to be adjusted. His study assumes hypothetically that all the 3,378 cars moved by rail over the B&O line would move by truck. He used a 1.2 circuity factor for truck movements based on calculations concerning two promient destination pairs, Cowden to Tower Hill and Beecher City to Flora. Mr. Penner states that it is unimportant to quibble about the use of the circuity factor since a change up or down, 1.0 to 1.4 would make no difference; if the highway truck distance was shorter than the rail distance, there would be only a slight change. His lack of complete origin and destination data meant that his study did not actually compare the rail distance with the truck distance.

Mr. Penner's study shows that B&O rail service uses significantly less energy per ton-mile than trucks which might assume existing rail traffic. It is impossible to calculate the exact magnitude of the energy cost increase without knowing the exact pattern of diversions for all shipments now using the B&O. Every ton-mile of rail freight switched from rail to truck incurs 1,240 BTU of additional energy use, an increase of 53 percent over rail. Because local traffic is being diverted from origins and destinations located on rail tracks, diversions from rail to truck will usually involve longer trips or more ton-miles. Mr. Penner estimates that a shift of all current B&O branch line freight to truck would require an additional 26.86 billion BTU annually, the equivalent of 194,300 gallons of diesel oil.

APPENDIX V

Bob Williams.—Bob Williams is owner of Bob Williams Grain & Fertilizer Co., an established grain marketing company with storage capacity of approximately 325,000 bushels at junction, approximately 3 miles north of Shawneetown. It is served by both the B&O and the L&N. He has primarily built his grain business around truck transportation because dependable rail service is unavailable. His company ships annually up to 5 million bushels of grain. If rail service and rates from junction to Taylorville, Springfield, and Decatur were improved, it is entirely possible that Bob Williams Grain & Fertilizer Company would move some of its soybeans and wheat to the processors at those points. However, it is highly unlikely that its corn shipments would move north to processors. With respect to soybean and wheat sales, it is very advantageous to have as many competitive markets available as possible. When he speaks of the possibility of grain shipments to the Central Illinois processors, he is referring to vigorous efforts to market its grain in this area.

He cannot predict how much soybean and wheat would move by rail to the grain processors at Taylorville, Springfield, and Decatur, if improved rail service and rates from junction to those points were available. The potential for such rail movement is very substantial and his company has the capacity to load 10 railcars of grain per day and its soybean and wheat annual volume approximates 1,000 rail carloads.

J. B. Critz.—J. B. Critz is district manager, Shawneetown District, of the Bunge Corporation, which is engaged in marketing grain at a number of locations in the United States. Bunge maintains grain storage facilities for 3 1/2 million bushels at Shawneetown where it also maintains barge loading facilities. Grain is there received by rail and truck and is loaded outbound by barge, rail, and truck. Bunge's facility at Shawneetown is served by the B&O and L&N railroads which jointly own the tracks.

During the early 1970's and before, Bunge drew rail grain from elevators on the B&O north of Flora. Due to railcar shortages and noncompetitive rail rates, the rail movement from north of Flora to Bunge at Old Shawneetown dried up. Bunge would like to begin again to receive rail grain from B&O points north of Flora. It is difficult to estimate how much grain would move from those points to Bunge if the railroads once again aggressively sought that traffic. Mr. Critz points out that there is the potential for very large grain movement from those B&O points north of Flora.

David Sutton.—David Sutton is part owner of Hayden's Mill, a grain and feed business located in Omaha, IL, on the B&O line south of Fairfield. This company presently has a grain elevator of 150,000 bushel capacity. It also has a small warehouse at which it blends and bags feed for distribution in the local area. Due to poor rail service and rates of the B&O, the only railroad which serves its facility, Hayden's Mill has not made any outbound rail shipments of grain in the past 3 years. Prior to that time it had made grain shipments by rail to Central Illinois grain processors. Hayden's Mill presently receives approximately 150,000 tons of feed per month by truck from Evansville, IN, and about 200 tons of soybean meal per month from Danville, IL, by truck.

If Hayden's Mill could rely on good rail service and reasonable rates, it would double the storage capacity at its grain elevator and once again make rail shipments of grain to the processors at Taylorville, Springfield, and Decatur. Furthermore, Hayden's Mill plans to build a bulk-blend fertilizer plant at Omaha and begin to sell fertilizer to local farmers. Effective rail service is essential to those plans since trucking fertilizer ingredients is too costly. Fertilizer material it would receive at this new plant would likely move between Springfield and Flora on its way to Omaha. The company could easily receive 20 to 40 railcars of potash annually if it could get reliable rail service and fair rates.

Jerry Behimer.—Jerry Behimer is president and part-owner of Behimer and Kissner, Inc., which is engaged in the business of marketing grain. Its elevator at Mill Shoals is served solely by the B&O railroad. Mr. Behimer projects annual shipments of grain from that elevator in the range of 700,000 bushels, of which 300,000 bushels are wheat and soybeans and 100,000 bushels are corn. Another elevator it has acquired is at Springerton just a few miles south of Mill Shoals. This elevator is also served solely by the B&O. Its storage capacity is approximately 125,000 bushels. Mr. Behimer projects almost identical volume and breakdown of grain shipments from Springerton as from Mill Shoals.

The third elevator this company owns is at Enfield. This elevator is served by the B&O and the L&N and has a storage capacity of about 195,000 bushels. It is adding storage for 300,000 more. It is installing a grain dryer to permit that elevator to handle more corn. These improvements will triple its handling capacity. Mr. Behimer projects annual shipments of about 2 1/2 million bushels of grain from that elevator.

In the not-to-distant past, these elevators were primarily railroad-oriented for outbound shipments. As rail service, equipment supply and rail rates structure deteriorated, that has become less true. If the Prairie Trunk provides reliable frequent rail service, adequate railcar supply and competitive rates, its company will send a lot more grain north to processors at Taylorville, Springfield and Decatur than has recently been moved under ownership of the elevators by C. A. French and Sons. Mr. Behimer states that the B&O's rates on soybeans to Taylorville in shipper-furnished cars would be particularly attractive to his company, that competitive rail rates on wheat to Springfield would also attract much of its company's wheat to rail. He would very much like to market his company's grain to the Taylorville, Springfield, and Decatur grain processors since his company wants as many markets as possible for its grain. The only thing which has prevented these elevators from reaching the Central Illinois processors is the lack of aggressive railroad service and competitive rail rates. It is difficult to forecast specifically how much grain would so move, but he feels that the potential for rail shipments is staggering since the equivalent of approximately 2,000 rail carloads of grain is going to move annually from the three elevators which this company owns. There is the potential for the overwhelming bulk of that grain to move over Prairie Trunk and B&O to the Taylorville, Springfield, and Decatur grain processors.

APPENDIX VI

Discussion of financial data

1. ***Maintenance-of-way*** *and structures.*—Applicant's witness testified that the avoidable maintenance-of-way expenses depict actual expenditures incurred by the Baltimore and Ohio Railroad Company (B&O) in maintaining the 103.29 mile segment of line proposed for abandonment, noting that these expenses were obtained from actual company records.

Applicant's development of these expenses on the basis of actual expenditures incurred on the line to be abandoned is acceptable, conformers to the guidelines prescribed in CFR—Title 49—Section 1121, and conforms to the new guidelines prescribed in Ex Parte No. 274 (Sub-No. 2), *Abandonment of Railroad Lines and Discontinuance of Service* (effective November 1 1976).

2. *Maintenance of equipment.*—Maintenance of equipment expenses claimed as avoidable by applicant include account 311, Locomotive—Repairs; account 314, Freight—train car—repairs; and account 331 (52), Equipment depreciation—locomotives. For all three, the amounts claimed as avoidable were computed by the use of system multipliers, determined by dividing the systemwide expense by the total service units to obtain the related cost per unit, i.e., cost per locomotive gross ton-mile, cost per car-day, et cetera. For "Locomotive Repairs," the actual locomotive gross ton-miles incurred in servicing the 103.29-mile line were multiplied by system average cost per locomotive gross ton-mile. For "Freight Train Car Repairs," actual car-miles were multiplied by system average cost per car-mile while constructed car-days were multiplied by system average cost per car-day. For "Equipment Depreciation-Locomotives" actual locomotive unit-hours incurred in servicing the subject line were multiplied by system average cost per locomotive unit-hour.

The use of system multipliers, applied to actual operations of a particular segment of track, in developing maintenance of equipment expenses are generally acceptable. Applicant's claimed locomotive repair and depreciation expenses appear reasonable and would be avoidable upon abandonment. However, applicant's development of freight car costs on the basis of constructed car-days rather than actual car-days impugns its reliability. Applicant states that it normally assumes that all cars originating or terminating on the branch take 4 days to move to the branch and off the branch and all overhead or bridge cars take 1 day to traverse the branch. Since there is no support corroborating the representativeness of applicant's constructed car-days with respect to the actual car-days, the reasonableness of applicant's claimed freight car costs is questionable. As a result, expenses claimed for account 314 could be overstated or understated to the degree of divergence between applicant's constructed car-days and actual car-days. Exact restatement of account 314, however, cannot be ascertained from the record.

3. ***Transportation expenses.***—The various transportation expenses were developed in variant manners and must be treated individually. Applicant's explanation of these expenses and comments follow:

(a) ***Account 373, station employees.***—Applicant's witness testified that this expense was computed by multiplying the system average per station agent hour by 252 days. Applicant noted that the station agent at Taylorville, IL, is the only agency serving the subject line.

Since the station at Taylorville will be eliminated upon abandonment, it is clear that material expenses would be savable upon abandonment. However, labor expenses would be savable only if the involved employees were no longer required, or if they were retained for work on other portions of the system in lieu of hiring additional station personnel. Since applicant has agreed to abide by the "Burlington Conditions" and was uncertain as to the future disposition of these employees, there is no support corroborating the avoidability of this expenditure. Applicant's claimed station employee expenses are not shown to be avoidable.

Under the provisions of Ex Parte No. 274 (Sub-No. 2), *supra*, actual station employee wages may be considered avoidable when directly assigned to track to be abandoned. However, it must also be demonstrated that such costs would be avoided as a result of service being discontinued.

(b) *Accounts 392, train enginemen and 401, trainmen.*—Applicant's witness testified that this figure was developed from actual trainmen and enginemen payrolls covering actual train operations over the track. In later testimony, applicant's witness also acknowledged that firemen wages were included in the figure shown for accounts 392 and 401. These fireman wages amounted to $8,710 in 1974, $10,331 in 1975 and $11,094 for the first 6 months of 1976.

Applicant's development of crew wages on the basis of actual expenditures incurred on the line to be abandoned is acceptable. However, applicant's inclusion of fireman's wages is unacceptable. Since available, it is clear that he was assigned to the crew to provide work for him. If the fireman was not assigned to the Flora-Sangamon Junction trains, he would be assigned elsewhere. Under these circumstances, fireman wages cannot be considered an avoidable expense to the line. It should also be noted that it was stipulated (pages 1047 and 1241) that there were no firemen employed on the Flora-Sangamon Junction segment. Consequently, applicant's claimed expenses for accounts 392 and 401 have been restated to reflect the exclusion of fireman wages.

(c) *Account 394, train fuel.*—Applicant stated that train fuel expenses were computed by multiplying the actual branch locomotive unit-hours generated on the 103.29-mile line by system average cost per locomotive unit-hour for fuel. Applicant also stated that operations over the subject line since late 1974 have involved *two* locomotives per train.

Use of a system multiplier in developing train fuel expenses incurred on a particular segment of track is generally acceptable. However, as applicant stated, "its average cost per locomotive unit-hour assumes that all locomotives burn the same fuel which on an actual basis is not necessarily true." Since the GP-7 and GP-9 locomotives that service this line are primarily used by applicant in "road" service, it is quite possible that the average fuel cost per locomotive hour for these road locomotives would be different from applicant's *system* average fuel cost per locomotive hour, which includes "yard" locomotives. Exact restatement of account 394, however, cannot be computed from the record.

(d) *Account 400, servicing train locomotives.*—Applicant explained that servicing train locomotive expenses were computed by multiplying the actual locomotive unit-miles generated on the 103.29-mile line by the system average cost per locomotive unit-mile.

This method of developing servicing train locomotive expenses on the basis of the system average cost per locomotive unit-mile is acceptable. Moreover, since applicant stated that the locomotives used on the subject line would be used in other locations to avoid purchasing new locomotives, it is evident that there will be a reduction in the number of locomotives being serviced. Thus, applicant's claimed expense for servicing train locomotives is considered avoidable.

(e) *Account 402, train supplies and expenses.*—Applicant stated that train supplies and expenses were developed by applying the system average cost per train hour for train supplies to the actual hours of freight train cars traversing the line.

The methodology employed by applicant in computing train supplies and expenses associated with the subject line is acceptable. However, it should be noted that applicant's computation of the system average cost per train hour for train supplies includes heater and refrigerator charges and credits which are not to be included in account 402 expenses unless directly applicable to the branch. Since the commodities handled on the 103.29-mile line are such that they would not require heater or refrigerator services, the charges and credits associated with these services should have been excluded. As a result, applicant's claimed train supplies and expenses are overstated. Restatement of this expense, however, cannot be ascertained from the record. Nevertheless, this overstatement would not be substantial since the involved heater and refrigerator charges and credits are minimal.

(f) *Account 110, switching charges paid.*—Applicant testified that while this account is assigned under the ICC accounting system as a revenue item, it is actually a negative revenue item or a deduction from revenue. Applicant included this account in operating expenses since the switching charges paid by applicant to the Norfolk & Western Railroad Company for switching services at Taylorville are charged to this account.

While account 110 includes switching charges paid by applicant to other railroads, this account also includes revenue collected for switching service rendered by applicant. Thus, the amount claimed for account 110 should reflect the net amount of switching revenue accruing to applicant and not just the switching charges paid. Applicant has not made it clear that any switching revenue that should have been included in account 110 was considered in its calculation of avoidable switching charges. Consequently, the expenses claimed for account 110 are unacceptable.

(g) *Account 415, clearing wrecks and account 418, loss and damage.*—Applicant stated that the amounts shown were actual expenditures incurred.

Applicant's development of these two accounts on the basis of actual expenditures incurred is acceptable and is considered avoidable.

4. *Fringe benefits.*—Applicant testified that fringe benefit expenses were calculated by applying the system percentage of labor for fringe benefits to the labor costs on the 103.29-mile line. The specific percentages were 24.34 percent in 1974, 22.84 percent in 1975 and the first 6 months of 1976.

Since fringe benefit expenses are related directly to labor expenses, they are generally acceptable as avoidable expenses to the extent that the associated labor expenses are deemed avoidable. Since station and firemen labor expenses were disallowed as savable, the corresponding fringe benefits should accordingly be reduced. The restatement of applicant's expenses reflects this adjustment.

5. *Return on rail property.*—Applicant states that the return on rail property represents a foregone benefit of 8 percent applied on the net salvage value of the track and the value of the railroad right-of-way. Applicant notes that the net salvage value of track and materials is $1,596,224 and of the right-of-way is $860,000.

While the savings claimed by applicant from the investment of funds derived from the salvage of the line and the value of the railroad right-of-way may be a benefit accruing from the abandonment, such factors may not appropriately be given consideration in computing losses from the present operation. See *Chicago, B.&Q. R. Co., Abandonment*, 271 I.C.C. 261. The Commission has consistently rejected this theory. In fact, in *New York Central R. Co., Abandonment*, 254 I.C.C. 745, 755, the Commission stated:

> While it is true that interest on salvage value and the retained revenue resulting from use by former branch patrons of the Hudson division are further benefits which will accrue to applicant if the branch is abandoned, and show the additional burden upon applicant and upon interstate commerce if the operation of the branch is continued, we are of the opinion that such items cannot be considered as losses incurred in such operations.

Applicant's claimed return on rail property expenses is unacceptable.

6. *Off-branch costs.*—Applicant's witness testified that these costs were developed by applying the unit costs from the B&O Rail Form A, "Formula for Use in

Determining Rail Freight Service Costs," for 1974 and 1975 to the cars, tons, car-miles and ton-miles associated with the off-branch movement, and this is acceptable.

7. ***Restatement of the effect of the proposed abandonment on net railway operating income for 1974 and 1975.***—Expense claimed by applicant to be avoidable upon abandonment.

Account Number		Amount claimed	
		1974	1975
314	Freight cars-repairs	$37,240	$53,622
373	Station employees	13,346	14,112
392/401	Train enginemen and trainmen	108,070	132,324
394	Train fuel	53,552	114,686
402	Train supplies and expenses	34,701	52,454
110	Switching charges paid	10,907	14,732
	Fringe benefits	59,187	71,206
	Return on rail property	196,498	196,498

It is noted that while certain of the expenses were believed to have been overstated to some degree, the magnitude of these overstatements could not be ascertained from the record. As a result, the restatement of applicant's on-branch costs only excludes those expenses that are clearly defined as unacceptable. The results of our restatement of applicant's on-branch expenses are shown in table 1 as follows:

Restatement of the Baltimore and Ohio Railroad Company proposed abandonment from Flora to Sangamon Junction, IL. Branch maintenance and operating costs to be avoided upon adandonment—year 1974 and 1975

Account Number (1)	Account (2)	Basis of cost (3)	1974 (4)	1975 (5)
	Maintenance-of-way			
202	Roadway maintenance	Actual	$758	$6,405
208	Bridges, trestles and culverts	do	13,012	12,850
212	Ties	do	---------	13,029
216	Other track material	do	1,430	5,388
218	Ballast	do	530	1,282
220	Track laying and surfacing	do	105,065	120,811
221	Fences, snowsheds and signs	do	---------	---------
249	Signals and interlockers	do	3,575	6,735
272	Removing snow, ice, and sand	do	1,137	1,274
273	Crossing protection	do	530	2,090
278	Maintaining joint facilities	do	54,991	60,931
281	Right-of-way expenses	do	---------	---------
	Total maintenance-of-way		181,028	230,795
	Maintenance of equipment			
311	Locomotives—repairs	System average cost per locomotive gross ton-mile.	20,424	37,079
314, et al	Freight cars—repairs	System average cost per car-day and per car-mile.	37,240	53,622
331 (52)	Equipment depreciation—locomotives	System average cost per locomotive unit-hour.	2,550	7,034
	Total maintenance of equipment		60,214	97,735

TABLE I

Restatement of the Baltimore and Ohio Railroad Company proposed abandonment from Flora to Sangamon Junction, IL Branch maintenance and operating costs to be avoided upon adandonment—year 1974 and 1975—Continued

Account Number (1)	Account (2)	Basis of cost (3)	1974 (4)	1975 (5)
	Transportation			
373	Station employees	System average cost per station agent hour	----------	----------
392/401	Train enginemen and trainmen	Actual	98,302	120,689
394	Train fuel	System average cost per locomotive hour-	53,552	114,686
400	Servicing train locomotives	System average cost per locomotive mile-	4,222	6,857
402	Train supplies and expenses	System average cost per train hour	34,701	52,454
110	Switching charges paid	Actual	----------	----------
415	Clearing wrecks	do	3,041	25,974
418	Loss and damage; freight	do	779	10,782
	Total transportation		194,597	331,442
	Fringe benefits	Percent of labor	51,306	62,236
	Return on rail property			
	Track and materials	Net salvage value times return	----------	----------
	Real property	Nonrevertible real property value times return.	----------	----------
	Total return		----------	----------
	Total on branch costs		487,145	722,208

Inclusion of the total on-branch expenses shown in table 1 of the estimated effect of the proposed abandonment on applicant's net railway operating income produces the following results in table 2:

TABLE 2

Restatement of the estimated effect of the proposed abandonment on net railway operating income for the years 1974 and 1975

Item	1974	1975
1. Total revenues	$1,008,126	$1,366,124
2. Branch line costs	487,145	722,208
3. Off-branch costs	518,527	662,353
4. Net railway operating income (deficit)	2,454	(18,437)

The restatement in table 2 demonstrates that operations on the line resulted in a gain to applicant's system net operating income in 1974 and a loss in 1975. Due to applicant's apparent overstatement of certain expenses, which could not be recomputed from evidence of record, it is questionable that applicant actually sustained any loss at all in 1975. Moreover, if any loss did occur in 1975, it was primarily due to the added expenses associated with the use of *two locomotives per train* instead of *one* as in 1974. The slight increase in carload traffic between 1974 and 1975 does not appear to be of a magnitude sufficient to warrant the addition of a second locomotive to *each* train and no evidence supports such a requirement.

Applicant has failed to sustain the burden of proving its contention that operation of the subject line has resulted in a substantial loss to its system net operating income for 1974 and 1975.

FINANCE DOCKET NO. 28412

WINNEBAGO FARMERS ELEVATOR COMPANY v. CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

Decided March 29, 1978

Rail carrier service found to be inadequate and in violation of section 1(4) of the Interstate Commerce Act. Upgrading of Lake Crystal-Winnebago line ordered. Proceeding discontinued.

John F. Hacking for complainant.

Louis T. Duernick and *Christopher A. Mills* for defendant.

Robert L. Calhoun, Robert B. Einhorn, Donald A. Frederick, Thomas F. McFarland, Arthur von Rosenberg, Erick B. Schultz, David K. Schwartz, William L. Slover, Leo Smith, William K. Smith, Warren Spannaus, and *Frederick S. Suhler* for interveners in support of complainant.

REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

The modified procedure was followed in this proceeding. Because of the importance of the issues to be considered, the matter is being decided by the entire Commission.

In a prior order, served June 3, 1977, we allowed intervention for the purpose of allowing interested persons an opportunity to introduce argument on the jurisdictional issue. Requested findings not specifically discussed nor reflected in our findings or conclusions have been considered and found not justified or not necessary to our decision.

We note at the outset that this proceeding was initiated upon complaint, pursuant to section 13(1) of the Interstate Commerce Act. However, after having learned that Chicago and North Western Transportation Company had raised the Commission's alleged lack of jurisdiction as a defense in this proceeding, complainant brought an action in the Federal district court for Minnesota based on the same set of facts. *Winnebago Farmers Elevator Co.* v. *Chicago and*

North Western Transportation Co., 2-77-Civ. 167. Defendant then moved to dismiss or stay the court's decision pending action by the Commission. The court stayed the proceeding before it, by means of its "inherent power," so as to assure that there would be a forum in which to try the case if the Commission found it had no jurisdiction. However, the court saw no need to refer the case to us because of the existing complaint.

The Chicago and North Western Transportation Company (North Western or defendant) owns and operates a line of railroad which extends from Lake Crystal to Winnebago, MN, a distance of 24.6 miles in the counties of Blue Earth and Fairbault. In a prior proceeding, AB-1 (Sub-No. 20), *Chicago and North Western Transportation Company Abandonment Between Lake Crystal and Winnebago in Blue Earth and Fairbault Counties, Minnesota*, decided September 13, 1976, North Western sought authority to abandon this line. Authority was denied by the Commission. Winnebago Farmers Elevator Company (WFEC or complainant) contends that since 1971 North Western has failed and refused to provide reasonable and adequate transportation service to it and has failed and refused to furnish safe and adequate car service. Specifically, WFEC states that North Western refused to tender railcars upon its reasonable request when there was no general car shortage. Secondly, North Western never furnished WFEC with 100-ton jumbo covered hopper cars (covered hopper cars) for carriage of grain. Complainant states that this is the most economical method of transporting grain by rail and is available to WFEC's competitor, Frank Brothers, Inc. of Winnebago which is served by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee). The Milwaukee's line at Winnebago has apparently been upgraded to Federal Railroad Administration (FRA) class III track standards (49 CFR 213), thus making it capable of handling covered hopper cars. Because of the availability of this service, WFEC believes that it is severely handicapped when competing with Frank Brothers.[1]

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[1] WFEC is located on the North Western line in Winnebago, while Frank Brothers is located on the Milwaukee line in Winnebago. North Western has an interchange track at Winnebago which connects its line with the Milwaukee. WFEC offered to purchase approximately 1 mile of this line for the salvage value of $23,811 in 1975, to allow it to physically connect with Milwaukee. It was previously decided that, due to potential labor difficulties for both carriers, it would not be practical for North Western to sell this segment of line to Milwaukee. Subsequently, WFEC withdrew its offer to purchase this segment of the line, and opposed the abandonment application in AB-1 (Sub-No. 20). The cost of upgrading this segment to accommodate heavier traffic was a factor in WFEC's decision, since it estimated this cost to be in excess of $60,000.

WFEC states that North Western has allowed the line to fall into such disrepair as to be inadequate to accommodate covered hopper car service, or for that matter adequate rail service in any respect. Derailments and closures for extended periods of time occur with frequency. Forty-four percent of the ties on the line are incapable of holding the rails to gauge, and the track ballast is incapable of adequately distributing weight and providing for drainage. As a result on this disrepair, the line is subject to a speed restriction of 10 m.p.h. and a weight restriction of 251,000 pounds, a weight restriction which prevents North Western from operating covered hopper cars over the line.

WFEC attempts to document North Western's policy of allowing the line to deteriorate by stating that it spent only $284 and $508 per mile on maintenance and repair in 1971 and 1972, respectively, while on a systemwide basis for similar periods, North Western spent $2,267 and $3,120 a mile, respectively. Since 1972 North Western has continued to spend an inordinately small amount for maintenance and repair on the line.

WFEC also states that it constructed an additional storage facility with a capacity of 600,000 bushels in 1977, in reliance on the Commission's denial of the North Western abandonment in AB-1 (Sub-No. 20), at a cost of $260,000. The total capital invested in its facility and equipment exceeds $1,500,000. During all times under consideration (since 1971) WFEC has shipped in excess of 1 million bushels of grain annually, by motor carrier and rail combined. It asserts that if North Western would provide reasonable and adequate transportation service and facilities as well as furnish safe and adequate car service, it would ship 90 percent or more of its grain by rail.

In its complaint WFEC charges that section 1(4) and 1(11) of the Interstate Commerce Act (act) have been violated. Complainant requests injunctive relief and that the Commission order North Western to repair, refurbish, and maintain the line in a condition which will enable the North Western to provide reasonable and adequate rail transportation including, without limitation, covered hopper car service for the carriage of grain. Damages are also sought. In a subsequently filed verified statement, WFEC expanded and articulated the specific relief it requests. It requests rail service be made available to WFEC twice weekly on a year-round basis. It also requests that North Western be required to furnish railcars reasonably near the time they are promised by the carrier and that North Western provide and furnish covered hopper cars to WFEC.

JURISDICTION

Defendant argues that the Commission lacks jurisdiction to enforce section 1(4) of the act, which provides that "it shall be the duty of every common carrier *** to provide and furnish transportation upon reasonable request therefor ***."[2] Though agreeing with the interveners[3] that there are sound reasons in support of Commission jurisdiction, particularly based on the policy of avoiding duplicative judicial and Commission proceedings, North Western states that the holding of the Supreme Court in *United States* v. *Pennsylvania R. Co.*, 242 U.S. 208 (1916) *(Pennsylvania* case) controls. For that reason, it urges that the Commission's finding in other cases that it has no jurisdiction, based on the Supreme Court's decision, is correct. However, North Western also states that the doctrine of primary jurisdiction allows the Commission to resolve the merits of this proceeding, though not to award damages, because it claims that the Minnesota district court has referred this proceeding to the Commission.

The complainant and all interveners assert that the Commission does have jurisdiction to enforce the relevant portion of section 1(4). The primary argument made is that the decision in the *Pennsylvania* case, *supra,* has been overbroadly interpreted to deprive the Commission of all jurisdiction over adequacy of service under section 1(4), and that the correct interpretation is that the Commission has no jurisdiction to require a railroad to acquire special equipment in order to meet its duty to provide adequate service. Various interveners have also argued that the doctrine of primary jurisdiction enables the Commission to exercise jurisdiction. It is argued that such issues as the adequacy of service, the reasonableness of a shipper's request for transportation, and the effects of deferred track maintenance and depreciation, all of which are involved in this case, are matters within our administrative expertise. GMI states that while the Commission has primary jurisdiction, its jurisdiction is not exclusive. It argues that the courts have concurrent jurisdiction, particularly where the facts are clear or undisputed.

Duralite and Bloomer Shippers maintain that the failure of North Western to provide reasonable transportation presents a situation similar to an embargo, over which both the courts and the Commission have recognized the Commission's jurisdiction. Thus, we should also have jurisdiction in the instant case.

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[2] Commission jurisdiction to enforce section 1(11), violation of which is also alleged, is not disputed.

[3] Briefs were submitted by the following interveners: Duralite Company, Inc. (Duralite); Bloomer Shippers Association (Bloomer Shippers); the State of Minnesota (Minnesota); Western Coal Traffic League (Western Coal); National Council of Farmer Cooperatives; and General Mills, Inc. (GMI).

It has also been maintained by several interveners that the Supreme Court has in the last decade broadened its interpretation of the regulatory power possessed by administrative agencies. In particular, Bloomer Shippers and Western Coal refer to ***United States*** v. ***Southwestern Cable Co.***, 392 U.S. 157 (1968) and the ***Permian Basin Area Rate Cases***, 390 U.S. 747 (1968), in which it was found that regulatory agencies have powers which are "reasonably ancillary" to the effective performance of their functions. Western Coal also argues that the national transportation policy, as formulated by Congress for use by the Commission, includes the mandate "to promote safe, adequate, economical, and efficient service," and that attainment of this directive requires the Commission to enforce section 1(4).

Minnesota argues that as a matter of policy the Commission should have jurisdiction over section 1(4) of the act so as to expedite resolution of disputes involving adequacy of service.[4]

It has been the Commission's conclusion in a number of cases that we have no jurisdiction over the duty to provide adequate service as expressed in section 1(4) of the act. Even so, our findings that jurisdiction lies with the courts have been accompanied by frequent dissent. Moreover, we have not always found that we have no jurisdiction over alleged failure to provide service. ***Trojan Scrap Iron Corp.*** v. ***Boston & M. R.***, 270 I.C.C. 727, 729 (1948), overruled in ***Adequacies—Passenger Service—Southern Pac. Co.***, 335 I.C.C. 415, 430 (1969); ***Galveston Truck Line Corp.*** v. ***Ada Motor Lines, Inc.***, 73 M.C.C. 617 (1957); ***Vulcan Coal & Mining Co.*** v. ***I. C. R. R. Co.***, 33 I.C.C. 52, 64 (1915).[5] Additionally, several courts have found that we have primary jurisdiction over adequacy of service[6] and a 1975 decision stated that our jurisdiction over the duty to provide adequate service is "unsettled" at least where the requested transportation equipment is already owned by the carrier. *I.C.C.* v. *Baltimore and Annapolis Ry. Co.*, 398 F. Supp. 454, 468-69 (D. Md. 1975). It was against this background of uncertainty that we published our intention to review the correctness of two of the decisions (*Duralite Co., Inc.* v. *Erie Lackawanna Ry. Co.*, 339 I.C.C. 312 (1971) and *Adequacies, supra)* in which we found that we lacked jurisdiction to enforce compliance with section 1(4) of the act. 42 F.R. 28658 (1977).

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[4] Both GMI and Minnesota have offered suggestions that go beyond their role as interveners on the jurisdictional issue. GMI states that certain broad questions involving the merits of this case should be resolved in Ex Parte No. 270 (Sub-No. 2), Investigation of Railroad Freight Service, rather than in this proceeding. This would be improper insofar as it would prevent us from deciding the instant case. Minnesota argues that the emphasis in abandonment proceedings on showing that a line is not profitable encourages carriers to offer poor service prior to abandonment. Though this argument exceeds the scope of their intervention, the issue is relevant to this proceeding and is discussed in a later section of this report.

[5] The *Trojan* decision was followed in ***Chesapeake and Ohio Ry. Co.*** v. ***United States***, 298 F. Supp. 734, 740 (W. D. Ky. 1969). Also, the Supreme Court cited the *Galveston* case with approval in ***Carpenters' Union*** v. ***Labor Board***, 357 U.S. 93, 109 (1958), noting that the Commission was enforcing the duties imposed upon carriers by the act and their certificates.

[6] ***Elgin Coal Co.*** v. ***Louisville & Nashville R. Co.***, 411 F. 2d 1043 (6 Cir. 1969); ***Spence*** v. ***Baltimore & Ohio R. Co.***, 360 F. 2d 887 (7 Cir. 1966); ***Iowa City-Montezuma R. Shippers Ass'n.*** v. ***United States***, 338 F. Supp. 1383 (S.D. Iowa 1972).

Before examining our jurisdiction under the Interstate Commerce Act and in light of judicial precedent, we observe that defendant is in error in stating that we have primary jurisdiction in this proceeding because the Federal district court for Minnesota has referred it to us. This statement is wrong in several respects. First, that court stayed the action before it pending our decision in the instant case, but did not refer it to us. Second, the court specifically stated that it did not find that we have primary jurisdiction, though it did observe that its decision is subject to reconsideration if the issues "appear fit for agency resolution" when the record is more complete. *Winnebago Farmers Elevator Co.* v. *Chicago and North Western Transportation Co.*, 2-77-Civ. 167 (D. Minn., August 17, 1977). Third, as previously stated, this proceeding does not involve a referral at all, since it arose upon complaint to the Commission.

The examination of our jurisdiction over section 1(4), and particularly over the carrier's duty to provide and furnish adequate service upon reasonable request, necessarily begins with the *Pennsylvania* case, *supra*. That case involved the Supreme Court's determination as to the legality of a Commission order in *Pennsylvania Paraffine Works* v. *P. R. Co.*, 34 I.C.C. 179 (1915), requiring the Pennsylvania Railroad to furnish tank cars in sufficient number to transport complainant's normal shipments in interstate commerce. The order would have required the carrier to increase its supply of tank cars. 34 I.C.C. at 182. The Commission's order had earlier been suspended and annulled in *Pennsylvania R. Co.* v. *United States*, 227 Fed. 911 (W. D. Pa. 1915). The Supreme Court affirmed the lower court decision, finding that we had no jurisdiction to enforce our order, because at common law, prior to the Interstate Commerce Act, jurisdiction lay with the courts. The Court found that no section of the act specifically entrusted to the Commission the power which it had exercised. It was unwilling to infer that the Commission had the power to require carriers to furnish tank or other special cars from more general grants of authority[7] because:

> [I]f Congress had intended such ***consequence with all that it implies of expenses directly or indirectly*** it would not have left its intention to be evolved from obscure language, but would have put it in explicit declaration. [Emphasis added.]

242 U.S. at 231. The quoted paragraph provides a strong indication that the Court was not concerned with the Commission's general jurisdiction to require adequate service, but specifically with the Commission's power to make orders requiring carriers to increase their supply of special equipment. This is clearly stated in the opening paragraph of the opinion of the Court.

> The question in the case is, Has the Commission the jurisdiction exercised by the order? It is not denied that the Commission has power over the general equipment of a carrier, but it is denied that it has power to require "vehicles of a special type having no reference to the safety of transportation," and to this distinction the argument of counsel for the railroad company, is addressed.

242 U.S. at 217.[8] In the instant case complainant does not ask that cars be acquired. Thus, a far better indication of what the Court's opinion would be regarding the Commission's jurisdiction in this proceeding is provided by *Chicago, R. I. P. R. Co.* v. *Hardwick Farmers Elev. Co.*, 226 U.S. 426, 434-35 (1913). Therein the Court decided that a Minnesota statute, which required railway companies to furnish freight cars on the demand of shippers, was preempted by Federal law. Referring to then-section 1 of the act, the Court said:

> Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the act to regulate commerce give remedies for the violation of that duty. *** [B]y section 9 an election is given to either make complaint to the Interstate Commerce Commission or to bring, in a designated court, an action for the recovery of damages; ***.

Though the Commission's jurisdiction was not directly in issue, this statement gives powerful support to those claiming the Commission has jurisdiction in this case. We find that the rule of the *Pennsylvania* case, *supra*, was not intended to apply to all actions taken to enforce section 1(4) of the act, but only to what was then considered the extraordinary action of requiring a carrier to obtain special equipment to fulfill its duty under the act.

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[7] Section 12 stated that the "Commission is hereby authorized and required to execute and enforce the provisions of this act." Section 15 gave the Commission authority to enter an order concerning "rates for transportation and regulations and practices 'affecting such rates' " 242 U.S. at 227-28.

[8] The conclusion that the only issue in the case was the Commission's power to make an order requiring carriers to provide special cars which they did not then possess is supported by the lower court's statement of the issue, 227 Fed. at 914, as well as the defendant's contentions before the Commission, 34 I.C.C. at 184. This interpretation of the *Pennsylvania* case, *supra*, was also stated in the report of the coordinator, Ex Parte No. 270 (Sub-No. 2), *Investigation of Railroad Freight Service*, 345 I.C.C. 1223, 1236 (1976).

Even in this sphere, the validity of the *Pennsylvania* case, *supra*, is questionable since the Commission subsequently acquired jurisdiction under the Esch Car Service Act, as amended by the Transportation Act of 1920, to take the action which the *Pennsylvania* case, *supra*, prohibited. Section 1(11) of the Interstate Commerce Act makes it "the duty of every carrier by railroad subject to this part to furnish safe and adequate car service ***." Section 1(10) defines car service as:

> ***the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment,***.

The Commission has been upheld in exercising its authority under the car service provisions, *United States* v. *Allegheny-Ludlum Steel*, 406 U.S. 742 (1972); and it has been recognized that where a violation of section 1(11) was alleged that referral to the Commission is required, *Elgin Coal Co.* v. *Louisville & Nashville R. Co.*, 411 F. 2d 1043 (7 Cir. 1969).

The legislative history clearly indicates that the rule of the *Pennsylvania* case, *supra*, was to be nullified. The 1920 amendment, in defining car service, added the authority to regulate "the use, control, [and] supply of cars." Congressman Esch, Chairman of the House Committee on Interstate and Foreign Commerce, and one of the chief sponsors of the legislation, stated, in discussing the bill on the House floor, that the *Pennsylvania* case, *supra*, had held that the Commission has no power to order a carrier to supply itself with tank cars, but that "[t]his section would give the Commission power to order the carrier to supply itself with cars." 58 Cong. Rec. 8315-16 (1919). A nearly identical statement was made by the House committee in reporting the bill out favorably. H.R. Rep. No. 456, 66th Cong., 1st Sess. 17 (1919).[9]

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[9] This same conclusion is stated by then Commissioner Edgar E. Clark, appearing at *Hearings on H.R. 4378 Before the House Comm. on Interstate and Foreign Commerce*, 66th Cong., 1st Sess., pt. 1, at 11-12 (1919). Although H.R. 4378 was redrafted as H.R. 10453 and several amendments were proposed by the Senate, there was no material change in the car service provisions as here pertinent. See MacVeagh, *The Transportation Act of 1920*, 7-8, 24, 26-27, 61-62, 518-20, 613, 615, 642, 644 681-83 (1923).

Because the 1920 amendment to the Esch Car Service Act expanded the definition of car service to include car supply, we find that the *Pennsylvania* case, *supra,* is no longer a valid precedent, being in effect overruled by Congress. Moreover, as previously discussed, the rule of the *Pennsylvania* case, *supra,* applied only to an order that special equipment be acquired, and therefore would not have governed this proceeding even if the precedent were still valid.

Having found that the *Pennsylvania* case, *supra,* does not prevent us from asserting jurisdiction, we must next determine on what basis jurisdiction can be asserted. We find that section 12 of the act, which provides that "[t]he Commission is hereby authorized and required to execute and enforce the provisions of [Part I of the act]," furnishes the Commission with ample authority to enforce the section 1(4) duty to provide adequate service. Unlike the situation in the *Pennsylvania* case, *supra,* in which the Commission's order could possibly be construed to infringe upon managerial discretion, and thus an "explicit declaration" of jurisdiction might reasonably be expected by the court, the relief asked in the instant case does not tend to erode managerial prerogative. Complainant specifically states that it would not require defendant "to purchase additional equipment or [use] equipment not now owned by [d]efendant and rail carriers in general." Complainant's reply statement, p. 7. Moreover, an express delegation of power is not necessary in a case such as this. The question of the effect of a lack of an express delegation of power to the Commission was raised in *American Trucking Assns.* v. *United States,* 344 U.S. 298, 309-10 (1953). The Supreme Court said:

> *** All urge upon us the fact that nowhere in the Act is there an express delegation of power to control, regulate or affect leasing practices, and it is further insisted that in each separate provision of the Act granting regulatory authority there is no direct implication of such power. Our function, however, does not stop with a section-by-section search for the phrase "regulation of leasing practices" among the literal words of the statutory provisions. As a matter of principle, we might agree with appellant's contentions if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency power, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience, either in fact or in the minds of Congress, does not exist. *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 219-220; *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177, 193-194. Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring

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> to their work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess. *United States*, v. *Pennsylvania R. Co.*, 323 U.S. 612.

Also, our finding of jurisdiction under section 12 of the act is supported by the ***Hardwick*** case, ***supra,*** in which the Supreme Court observed that an aggrieved party could elect to pursue its remedy for failure to have cars furnished upon reasonable request in the courts or before the Commission under section 9 of the act. If the act provides the right to pursue one's remedy before the Commission, it follows that it must also give the Commission jurisdiction to hear the complaint. Lastly, we note that there is no express prohibition against enforcement of section 1(4) by the Commission. This can be compared with the explicit statement under section 1a(9) that enforcement of that section shall be in the courts.

Recent decisions of the Supreme Court in the *United States* v. ***Southwestern Cable Co.,*** 392 U.S. 157 (1968) (*CATV* case) and the ***Permian Basin Area Rate*** cases, 390 U.S. 747 (1968), also support our conclusion that we have jurisdiction in this matter. In the *CATV* case, ***supra,*** it was decided that the Federal Communications Commission has powers "reasonably ancillary" to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting, including authority to regulate cable television. 392 U.S. 178. It was determined that:

> [T]he Commission has reasonably concluded that regulatory authority over CATV is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities. Congress has imposed upon the Commission the "obligation of providing a widely dispersed radio and television service," with a "fair, efficient, and equitable distribution" of service among the "several states and communities."

392 U.S. at 173-74. In the ***Permian Basin*** case, ***supra,*** the Court found that the Federal Power Commission had power to impose moratoria on rate increases because it was "imperative for the achievement of the agency's ultimate purposes," and because there was no compelling evidence that Congress meant to prohibit such action. 390 U.S. 780. We believe that the power to enforce the duty of adequate service is imperative to our ultimate purposes and responsibilities, and thus that we have jurisdiction to enforce section 1(4). This was made apparent by the addition of a national transportation policy to the Interstate Commerce Act, including the mandate "to promote safe, adequate, economical, and efficient

service."[10] The degree to which we are responsible for enforcement of the duty to provide and furnish adequate service is also shown by our jurisdiction over the validity and reasonableness of embargoes;[11] the requirement that a railroad desiring to abandon or discontinue all or any portion of its rail lines must obtain a certificate issued by the Commission, often after investigation;[12] the studies which have been or are about to be made concerning track rehabilitation and maintenance;[13] as well as our jurisdiction over the provision of safe and adequate facilities for car service under section 1(11) of the act.

We are aware that in *Adequacies, supra,* we found that the *CATV* case, *supra,* and the *Permian Basin* cases, *supra,* did not justify Commission jurisdiction over section 1(4). That finding was based on (1) our belief that the *Pennsylvania* case, *supra,* was controlling, (2) distinguishing the *CATV* case, *supra,* on the grounds that the Federal Communications Commission was then dealing with a communications medium not in existence when its enabling act was passed, (3) a finding that neither case established that jurisdiction is created by changing times and carrier conduct. However, as previously discussed, we now conclude that the *Pennsylvania* case, *supra,* is not controlling. Additionally, distinguishing the *CATV* case, *supra,* because it dealt with a new medium does not allow us also to distinguish the *Permian Basin* cases, *supra.* Instead, the fact that the *Permian Basin* cases, *supra,* are not based on a similar situation suggests that the existence of a new medium was not a vital factor in the *CATV* decision. Lastly, whether these cases establish that changing times or carrier conduct create jurisdiction is irrelevant to this proceeding. Our finding of jurisdiction is not based on changed conditions or on conduct, but only on what we conclude is the proper interpretation of the relevant cases, and the Interstate Commerce Act.

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[10] The national transportation policy constitutes substantive law to be implemented by the Commission. See *American Lines,* v. *L. & N. R. Co.,* 392 U.S. 571 (1968); *Schaffer Transportation Co.* v. *United States,* 355 U.S. 83 (1957); *Dixie Carriers* v. *United States,* 351 U.S. 56 (1956); *Need for Defining Reasonable Dispatch,* 351 I.C.C. 812, 829 (1976).

[11] Our jurisdiction over embargoes has been recognized in *Chicago & North Western Ry.* v. *Union Packing Co.,* 373 F. Supp. 734, 737 (D. Neb. 1974); *Asbury* v. *Chesapeake & Ohio Ry. Co.,* 314 F. Supp. 310, 312-13 (D. D.C. 1970); *New York Central R.* v. *United States,* 201 F. Supp. 958, 959 (S.D.N.Y. 1962), vacated as moot, 371 U.S. 805 (1962).

[12] Sections 1a(1) and 1a(3) of the act, as amended by section 802 of the Railroad Revitalization and Regulatory Reform Act of 1976.

[13] Ex Parte No. 270 (Sub-No. 2), *Investigation of Railroad Freight Service, supra* at 1278; docket No. 36557, *Reporting Railroad Track Maintenance* (notice of proposed rulemaking and order, served July 5, 1977).

The application of the primary jurisdiction doctrine should be mentioned, though it is not directly at issue.[14] Several interveners have argued that jurisdiction could be asserted in this proceeding on this ground, but the Federal district court for Minnesota has expressed its opinion that the doctrine does not apply, though it acknowledged that its opinion may be subject to reconsideration.

We believe that in most cases involving the duty to provide adequate service the Commission should have primary jurisdiction. In the interest of uniformity and in order to obtain the benefit of the Commission's administrative expertise, referral to the Commission should be made when the defendant has elected to pursue its remedy in the courts. *Elgin Coal Co.* v. *Louisville & Nashville R. Co.*, 411 F. 2d 1043, 1045-46 (6 Cir. 1969); *Spence* v. *Baltimore & Ohio R. Co.*, 360 F. 2d 887, 890 (7 Cir. 1966); *Iowa City-Montezuma R. Shippers Ass'n.* v. *United States*, 338 F. Supp. 1383, 1390, 1393 (S.D. Iowa 1972). Because of these decisions, and because in nearly every case relating to service arising under section 1(4) there are administrative questions concerning what level of service is adequate and whether a request for service is reasonable, we believe that the doctrine of primary jurisdiction requires that these cases be referred to the Commission. However, we do not mean to suggest that all cases involving allegedly inadequate service must be referred to us. In those cases in which facts are not in dispute or only the interpretation of the law or regulations is at issue it would be appropriate for the courts to make the initial decision. *Elgin Coal, supra* at 1046, *Vulcan Coal, supra* at 64-65.

We recognize that in finding that the Commission has jurisdiction to enforce the duty to provide adequate service under section 1(4) of the act, that we are in effect overruling longstanding Commission precedent.[15] But an administrative agency is not inextricably bound

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[14] This proceeding arose by complaint to the Commission. Subsequently, complainant initiated an action before the Federal district court for Minnesota, which action was stayed pending our decision in this proceeding. Since the Commission has jurisdiction in its own right, and since the Minnesota court has stayed the action before it, there is no need to decide whose jurisdiction is primary.

[15] The Commission has found that it has no jurisdiction to enforce section 1(4) of the act in the following cases: *Nebraska Pub. Serv. Comm.* v. *C. & N. W. Transp. Co.*, 348 I.C.C. 27, 29 (1974); *C.O.D. and Freight-Collect Shipments*, 343 I.C.C. 692, 721 (1973); *Duralite Co., Inc.* v. *Erie Lackawanna Ry. Co., supra* at 314; *Oliver Mfg. Supply Co.* v. *Reading Co.*, 297 I.C.C. 654, 658 (1956); *Jacksonville Pt. Term. Operators Assn.* v. *A., T. & N. R. Corp.*, 263 I.C.C. 111, 116 (1945); *C. S. Wells & Son* v. *Chicago, B. & Q. R. Co.*, 161 I.C.C. 145, 148 (1930). None of these proceedings discusses why the Commission has no jurisdiction, except to cite the *Pennsylvania* case *supra*, or other Commission proceedings which themselves only cite the *Pennsylvania* case

Footnote 5 continued on next page.

by its past decisions or policies since this would deter necessary flexibility. In *Atchison, T. & S. F. Ry. Co.* v. *United States,* 387 U.S. 397 (1967), reh. den. 389 U.S. 892 (1967), the Supreme Court ruled on the change in the Commission's construction of the rights of motor carriers to avail themselves of rail services. The Court found that the Commission may, "in light of reconsideration of the relevant facts and its mandate, *** alter its past interpretation and overturn past administrative rulings and practice." 387 U.S. at 416.

In light of the preceding discussion we preclude that the Commission has jurisdiction to enforce the carrier's duty under section 1(4) of the act "to provide and furnish transportation upon reasonable request therefor."

LEVELS OF SERVICE

Complainant alleges that section 1(4) and 1(11) of the act have been violated. It is imperative to our analysis of the issues in this proceeding that we differentiate between the subject matter of the two sections. Section 1(4) requires that common carriers provide adequate "transportation" upon reasonable request. In turn, section 1(3) defines "transportation" broadly, to include:

> *** locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

Section 1(11) requires that safe and adequate "car service" be furnished. Section 1(10) defines "car service" as including:

> *** the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part.

While "transportation" is a broadly defined term, "car service" has been found to relate only to "the use to which the vehicles of

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(footnote 5 continued.)

supra. In finding that the *Pennsylvania* case, *supra,* does not prevent our jurisdiction, we are overruling contrary findings in these cases.

Similarly, we overrule *Adequacies, supra,* to the extent it conflicts with our findings herein. We note, however, that in *Adequacies, supra,* we found jurisdiction over passenger service on the basis of section 13a of the act. Our findings in this proceeding do not disturb that jurisdictional finding in *Adequacies, supra.*

transportation are put; not the transportation service rendered by means of them." *Peoria Ry. Co.* v. *United States,* 263 U.S. 528, 533 (1924). Section 1(11) deals not with transportation itself, but with the vehicle by which transportation is accomplished. Thus, in *Houston Belt & T. Ry. Co.* v. *Texas & N. O. R. Co.,* 298 I.C.C. 221 (1956), the Commission found it had no jurisdiction under section 1(11) to require a carrier to deliver freight. Similarly, it was found in *Louisiana Grocer Co-Operative* v. *Illinois C. G. R.,* 353 I.C.C. 606, 608 (1977), that switching was not within the scope of section 1(11). See *Compensation for Transportation Service,* 332 I.C.C. 554 (1968). It seems clear that the duty to provide safe and adequate "car service" under section 1(11) involves the vehicles which are used, but not the transportation provided by means of them. Thus, in this proceeding only the request that we make the use of 100-ton covered hopper cars feasible comes within the scope of section 1(11). In no other respect does complainant allege that the vehicles themselves are deficient, but only that the regularity of their transportation is inadequate.

The limited duty under section 1(11) can be contrasted with the duty to provide "transportation" under section 1(4). The latter duty, as defined in section 1(3) of the act, includes not only transportation services provided and vehicles used, but also "all instrumentalities and facilities," such as tracks. Thus, section 1(4) is broad enough to encompass the entire subject matter of the complaint.

Turning first to whether the cars provided have been safe and adequate under both sections 1(4) and 1(11), we note that there are no facts alleged from which we could conclude that the cars now used are unsafe. We also note that WFEC has asked that we order North Western to upgrade the track to such a level that service could be offered by means of hopper cars. This would require that the load limitation be raised from 251,000 to 263,000 pounds. WFEC states that this is the only way it can compete with the Frank Brothers elevator, which is also located in Winnebago, but on a different rail line.[18]

We reject this argument. Such upgrading would require a virtual reconstruction of the line. As North Western notes, the line was not intended to carry hopper cars when built. North Western submitted evidence of the estimated cost of upgrading the 24.6-mile line to FRA class I standards, suitable for handling 263,000 pound loads. This would allow operation of jumbo hopper cars over the line, through service interruptions would continue in the winter months because of inability to plow snow at speed of 10 m.p.h. The cost is estimated at $2,051,400 and includes replacing all 72-pound and rerolled 80-pound rail in the main track with usable 90-pound rail, placing approximately 1,000 cubic yards of ballast per mile, installing approximately 350 ties per mile, and installing approximately 2,166 rail anchors per mile. Estimated annual maintenance of the upgraded line would be $78,565, based on installing 65 ties per mile annually, 50 cubic yards of ballast per mile annually, and other work to keep the line in compliance with minimum FRA class I standards.

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[18] No allegation of undue preference or prejudice has been made under section 3(1) of the act.

North Western also submitted cost estimates for upgrading the line to make it suitable for reasonably safe operation at 30 m.p.h with a load limit of 263,000 pounds, and to comply with FRA class III standards. The cost was estimated at $2,722,035 and was based on replacing existing 72-pound, 80-pound, and rerolled 80-pound rail with continuous welded, usable 90-pound rail, installing approximately 700 ties per mile, and placing 2,200 cubic yards of ballast per mile and surfacing. All of these estimates were based on extrapolation of the cost of upgrading submitted in AB-1 (Sub-No. 20). The figures were adjusted for increases in costs of materials and wages for the intervening period. While it is difficult to judge how accurate the figures are, they are the best estimates available of the costs to be incurred and, since WFEC has not tried to rebut them, will be given appropriate weight. We find that these costs illustrate that the cost of upgrading the 24.6-mile line to handle 263,000 pound loads is excessive, and thus not warranted on this record. We also note that if North Western was required to upgrade all the branch lines in its system so that covered hopper cars could be used, that an expenditure of $200 million would be required. This is an expenditure which even the most financially successful railroad would find onerous, and one which the North Western could find impossible. Nor does the mere fact that a competing elevator has access to superior facilities automatically require that we find that sections 1(4) and 1(11) of the act require that that level of service must be produced in all in other situations. Expense and physical limitations of the Lake Crystal-Winnebago line are controlling in such a situation. Thus, we find that there is no violation of section 1(11) and no violation of section 1(4) as it applies to use of covered hopper cars. Suitability of the track for movement of boxcars is sufficient.

In determining whether upgrading of rail line to a level at which hopper cars can be used should be ordered, we considered the state of branch line railroading in the Nation and on the North Western. Large segments of the original railroad plant still exist, some of which have undergone only slight modifications since their construction when economic and social conditions were much different than today. Large networks of lines were built to handle virtually all of the Nation's freight. Railroad locomotives and cars were small, and much of the system was constructed with 72- to 80-pound rail, including the Lake Crystal-Winnebago line. Most of these lines had weight limits of only 210,000 pounds. Sometimes, to reduce the necessity for future maintenance, lines with weight limits of 251,000 pounds, such as the Lake Crystal-Winnebago line, were constructed. The appearance of the covered hopper along with generally increased weights of railroad equipment occurred only within the last 20 years, well after the construction of most of the branch lines.

North Western operates a system of 9,977 miles in 11 States. Of this mileage, 2,982 miles are main lines and 6,995 miles are branch lines. However, in terms of total volume and revenues, branch lines constitute a minor portion of this system. For example, in 1976 approximately one-half of North Western's branch line mileage generated less than 4 percent of its total revenues. Thus, there must be some balance struck between the level of service which must be provided, the condition of the track, and the amount of revenue which will be derived.

Even though we find that upgrading the track so that 100-ton hopper cars can be used is not required, the question of whether the transportation provided by means of the cars now used is adequate under section 1(4) of the act still remains. In evaluating its service North Western does not contest the fact that derailments have occurred or that the track fails to meet minimum FRA class I standards. There is, however, a wide discrepancy between complainant and defendant in respect to the claimed percent of cars ordered which were actually furnished. North Western states that from 1973 through the first 6 months of 1977, 32.3, 100, 85, 93.1 and 100 percent, respectively, of the cars ordered were later furnished. On the other hand, WFEC claims that from 1973 through 1977, 40, 73, 68, 63, and 75 percent, respectively, of the volume of traffic it desired to ship by rail had to be shipped by truck. Neither party attempts to reconcile these figures.

We note the apparent inconsistency of WFEC's figures with those it offered in the prior abandonment proceeding involving this line, AB-1 (Sub-No. 20). WFEC there stated that 70, 50, and 66 percent of its traffic had moved by rail in 1973 through 1975, respectively. This is quite different from its statement that 40, 73, and 68 percent of its grain traffic moved by truck in those years. Even though the precise percentages are inconsistent, in each case it appears that a substantial portion of the traffic has moved by truck. It also appears that rail service was not available at certain times. This is particularly true after derailments and during winter months when snow could not be plowed from the track because of speed restrictions. We also note that WFEC had to dump 35,000, 50,000, and 200,000 bushels of grain on the ground from 1973 through 1975 because of the inability to procure transportation. This supports its claim that service was inadequate. Conversely, North Western's figures appear inaccurate because, in the same year in which 35,000 bushels of grain were dumped, North Western claims to have furnished all the cars asked for.

The occurrence of derailments requiring closure of the line and North Western's admission that it maintains the line at a level below the Federal minimum level, as well as the necessity of dumping grain when transportation was not available, all support WFEC's claim that the transportation provided by North Western was not adequate. We, therefore, find that the transportation provided was not adequate within the meaning of section 1(4) of the act.

For the Lake Crystal-Winnebago line adequate service is: (1) track maintained to FRA class I standards, (2) service commensurate with this level of maintenance, and (3) reasonable availability of equipment that can be accommodated on track maintained at FRA class I level (boxcars). Maintenance, service, and equipment at levels in excess of this for branch line operations is a matter within the managerial discretion of the carrier. Thus, the financial condition and management philosophy of the carrier determines what place branch lines have in its system, provided the minimums required in this proceeding are maintained by North Western.

Use of FRA class I standards as the minimum level of maintenance has several advantages. It is an objective engineering standard which can be ascertained by examination of 49 CFR 213. More importantly, it is the minimum standard required by Federal law for the last 5 years. Operations over track that is not in compliance with minimum FRA standards is in violation of 49 CFR 213.5(a) which requires that:

> Any owner of track to which this part applies who knows or has notice that the track does not comply with the requirements of this part shall bring the track into compliance or halt operations over that track.

Exemption from the regulations may be granted by the Administrator of FRA under 49 CFR 213.17, if in the public interest and consistent with railroad safety. Notice of the exemption and the reasons for it must be published in the Federal Register if it is granted. Federal regulation, 49 CFR 213.11, also allows temporary operations while upgrading of a deficient line is taking place. If no exemptions are enforce, 49 CFR 213.15 provides for a civil penalty of at least $200 and not more than $2,500 for each offense, with each day's violation treated as a separate offense.

However, North Western contends that section 1(4) requires only the service be reasonable under the circumstances. It argues that the relevant circumstances include (1) that the service provided WFEC is no different from that given to other grain elevators on North Western's branch lines, particularly with respect to the nonavailability of covered hopper cars; (2) that the Lake Crystal line has suffered losses of $25,000 and $40,000 in 1975 and 1976, and $20,000 in the first 6 months of 1977; (3) that the North Western is in poor financial condition, presently has a working capital deficit of $15 million, and has had to defer maintenance; and (4) that it is unlikely that North Western can recoup an expenditure of $2,700,000 which it states would be needed to upgrade the line to class III level with a load limit of 263,000 pounds. It believes that these factors should be considered in deciding whether the line should be upgraded.

Assuming, *arguendo*, that section 1(4) requires only what is reasonable under the circumstances, we find that it is reasonable under the circumstances to require upgrading to the class I level. As already noted, class I track is the minimum standard under Federal law, and has been so for 5 years. Moreover, North Western's argument that rehabilitation cost of $2,700,000 could not be recouped is not relevant here, since we are only requiring that upgrading to class I, the cost of which North Western estimates at

$228,070,[17] be undertaken. Similarly, the argument that hopper cars are not provided to other shippers is irrelevant because we are not ordering that the line be upgraded to a level at which hopper cars can be used. Lastly, North Western admits that it has adequate funds to undertake the upgrading, though it would prefer to spend them elsewhere.

In finding that NorthWestern must upgrade its track to the class I level in order to provide adequate transportation and car service, we are not unmindful of the fact that the Commission has found that deferred maintenance is a legitimate carrier policy, and does not constitute deliberate downgrading of service, except in certain situations. See ***Missouri-Kansas-Texas R. Co. Abandonment, Okla.***, 338 I.C.C. 728 (1971). However, where deferred maintenance is of such degree that a line requires upgrading to meet FRA class I standards, as in this proceeding, it may violate the railroad's duties as a common carrier.

We now come to a determination of the frequency of service appropriate for track maintained at FRA class I levels. WFEC has requested a minimum of twice weekly service. The line is presently served on an "as needed" basis, with complete service interruptions during portions of winter because of the snow removal problem. As a result of these factors, the line receives service an average of less than once a week. We believe that a continuation of service on an "as needed" basis is appropriate. The snow removal problem eliminates the practicality of year-round, twice weekly operations. In order to provide year-round service the track would have to be upgraded to a class III level, which allows for speeds of 30 m.p.h. and would permit snow plowing. As previously indicated, North Western estimates that the cost of upgrading the track to class III level would exceed $2 million. We find that this expense is unwarranted and exceeds the minimum service which we require in this situation.

Though we are allowing North Western to maintain service upon an "as needed" basis, we expect that if North Western upgrades the line and commits funds to the projects, that it will try to keep the level of service adequate. Upgrading of the line to minimum FRA class I standards would improve the overall level of service, and would probably reduce the expenses associated with the frequent derailments and stop-gap measures North Western has had to undertake, such an examination of the line prior to an actual train movement. However, we reserve the right to order a minimum number of trips in the future if the situation were to warrant it.

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[17] The cost of $228,070 is based on installing approximately 150 ties per mile, placing approximately 750 cubic yards of ballast per mile, replacing defective rails, surfacing as needed, and a small amount of brush cutting. This would allow no change in the present load limit of 251,000 pounds. Such a limit does not allow operation of covered hopper cars. North Western estimates annual maintenance costs of a line upgraded to this level to be $81,315, based on installing 65 ties per mile, 50 cubic yards of ballast annually, and other minimum maintenance to keep the line at FRA class I standards.

The equipment for loading of grain at WFEC should be the type that can be handled on track upgraded to FRA class I standards; i.e., boxcars. While it is true that the line can be upgraded to handle covered hoppers on FRA class I track, such upgrading would be impractical since it would involve a virtual reconstruction of the line to allow it to carry 263,000-pound loads. As already stated, the cost of this reconstruction would be prohibitive for the Lake Crystal-Winnebago line and catastrophic for the North Western if such upgrading were done on a systemwide scale.

Our findings in this proceeding warrant that we order North Western to upgrade the Lake Crystal-Winnebago line to FRA class I standards, capable of sustaining its present weight limit of 251,000 pounds. We agree with WFEC that the proper course is to order North Western to file a plan of renovation and maintenance of the branch line stating the repair, maintenance, and renovation to be undertaken and the proposed dates for completion of these steps. One month from the effective date of this report and order North Western shall submit to us a plan for upgrading the Lake Crystal-Winnebago line. The plan shall provide for upgrading of the line to the level stated in this report within 1 year from its effective date. North Western has indicated the cost of such upgrading would be approximately $228,000. It has also submitted identical cost estimates in its newly filed abandonment application in AB-1 (Sub-No. 57), Chicago and North Western Transportation Company Abandonment Between Lake Crystal and Winnebago in Blue Earth and Fairbault Counties, Minnesota. This application was filed October 20, 1977. Any discrepancy between the evidence concerning the cost of upgrading submitted in these two proceedings, and the expenditures actually projected and subsequently incurred by North Western in upgrading the line to FRA class I standards should be fully documented. Any statement that upgrading costs would be *less* than that verified as factual in these proceedings also should be fully documented and explained.

TIMING OF RELIEF

The pending abandonment proceeding in AB-1 (Sub-No. 57) raises an additional problem: should the Commission stay the effectiveness of our order to upgrade the Lake Crystal-Winnebago line until this abandonment proceeding is finally decided,[18] or should our order requiring upgrading be issued while the abandonment in AB-1 (Sub-No. 57) is still pending?

We believe that within the factual context of this proceeding, an order requiring upgrading should be issued regardless of the status of AB-1 (Sub-No. 57). To do otherewise would be to render a nullity the remedy enunciated in this proceeding. To amplify this statement some background is appropriate. AB-1 (Sub-No. 20), was filed on September 4, 1973. North Western, in its argument for abandonment in that proceeding, stated that the line was marginal, that rehabilitation to FRA class I standards and existing 251,000-pound weight limits would cost $200,305, and that continued annual maintenance inaccordance with those standards would be $67,445. Protestants to the abandonment, including WFEC, complained of inadequate service, attributable, to a considerable degree, to the undermaintained track. In an initial decision dated March 16, 1976, the North Western was denied authority to abandon the line. It was found that the line was only marginally unprofitable and that the dependence of local users on rail transportation required continuation of the North Western's operations. This finding was affirmed by the Commission, Division 3, in a decision and order dated September 13, 1976. WFEC states in its complaint that it expended approximately $260,000 to upgrade its facilities after the denial of AB-1 (Sub-No. 20). It alleges that despite the denial of the abandonment in AB-1 (Sub-No. 20), North Western did not attempt to repair the line or increase the quality of service rendered to patrons on the line, and that this situation forced WFEC to file this complaint to seek an alternate remedy. AB-1 (Sub-No. 57) was subsequently filed October 20, 1977 by North Western.[19]

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[18] Obviously if the abandonment application were granted, the order directing upgrading of the line to FRA class I standards would be vacated.

[19] Due to system diagram map and notice requirements of section 1a of the Interstate Commerce Act and our regulations implementing them, promulgated in Ex Parte No. 274 (Sub-No. 2), *Abandonment of Lines and Discontinuance of Service*, dated November 1, 1976, no abandonment applications, engendering significant opposition, could be filed until 4 months after a line appeared in category 1 on a carrier's system diagram map published in the Federal Register. The Lake Crystal-Winnebago line appeared on North Western's system diagram map published in the Federal Register on May 3, 1977. Therefore, application for abandonment under section 1a could not be filed until early September, under the requirements of section 1a(5)(b) of the act.

From an examination of this chronology it is apparent that North Western never intended to upgrade service on the line as a result of the denial of AB-1 (Sub-No. 20), but merely intended to file another abandonment application. It should be noted that in AB-1 (Sub-No. 57) applicant relies on the same arguments used in the prior application, except that it now maintains that the cost of upgrading the line to the minimum standards required by Federal law has increased due to inflation and North Western's noncompliance with 49 CFR 213. The line itself continues to operate at a small loss. We are aware of the effect of such carrier conduct on this line and on others in similar circumstances. See *Chicago and North Western Transp. Co. Abandonment,* 354 I.C.C. 1 (1977). In such situations the carrier's arguments that declining traffic, increasing losses and rehabilitation costs making abandonment necessary become self-fulfilling prophecies. One abandonment application is followed by a second, and the arguments for abandonment are then strengthened because applicant has not made the repairs necessary to upgrade the line to minimum FRA standards.[20]

Thus, staying the effectiveness of our order to upgrade the line could unjustly prevent relief from being given for two reasons. First, there is nothing to limit a carrier's prerogative of filing repetitive abandonment applications, requiring an indefinite stay. Second, the carrier's successive abandonment applications become self-fulfilling prophecies because, if the line is not upgraded, inflation, further deterioration, and loss of traffic combine to make abandonment easier to justify in subsequent proceedings.

It is conceivable, however, that in a situation not involving repetitive abandonment applications an order requiring upgrading of a line would be stayed pending disposition of the abandomment proceeding. If the abandonment were granted, the order could be vacated. However, in this proceeding, North Western has been denied authority to abandon the line on one occasion, and has made no noticeable effort to correct the service and engineering defects[21]

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[20] The record in AB-1 (Sub-No. 57) contains an estimated subsidy payment computed by North Western in accordance with subpart D of the Commission's abandonment regulations. (49 CFR 1121.) This estimated subsidy payment includes the cost of upgrading the line to FRA class I standards.

[21] We are not indicating that a pattern of conduct such as the North Western's is deliberate downgrading as defined in *Missouri-Kansas-Texas Abandonment, Okla. supra.* In fact, the extreme difficulty of proving deliberate downgrading, probably resulted in complainant's action. In any event if a line has been deliberately downgraded, the theoretical remedy is to deny the abandonment application. In such a situation, however, there is no assurance that service would improve or minimum Federal safety standards would be achieved.

Rather it simply chose to file a second abandonment application. The complaint process and our determination of adequate maintenance, service and equipment in this proceeding should give shippers faced with the dilemma of successive abandonment applications and deteriorating, substandard track conditions a remedy. Considering our determination in this proceeding and North Western's election to file a second abandonment application rather than to upgrade the line to minimum Federal safety standards, our order directing upgrading of the line will not be stayed, even though North Western has pending a second abandonment application in AB-1 (Sub-No. 57).

DAMAGES

WFEC requests that the Commission award in damages for injuries proximately caused by North Western's failure to provide service as required by section 1(4) of the act. The amount of damages requested is composed of three elements. First, WFEC alleges that it was forced to ship 1,005,170 bushels of grain by motor carrier during the period from July 1, 1975 through June 30, 1977, which it would otherwise have shipped by rail but for the actions of North Western. Claiming that the difference in rates between the two modes was 2 cents per bushel, complainant asks that $20,103.40 be awarded. WFEC also alleges that during the same period terminal buyers consistently paid 4 cents per bushel less for grain delivered to them by motor than by rail, and asks $40,206.80 in damages. Lastly, WFEC asks that $25,000 be awarded it because of damage done to grain that it claims had to be dumped on the ground when North Western refused to provide adequate equipment for loading. Complainant computes its loss at 10 cents per bushel on 35,000, 50,000, and 200,000 bushels of grain dumped in 1974 through 1976 respectively.[22] Thus, the total amount of damages requested is $85,310.20.

If damages are to be awarded for failure to provide adequate service, such damages must be fully and precisely documented and be directly related to the carrier's failure to render the level of service which we require. Damages must originate in the carrier's failure to supply appropriate equipment, or the carrier's maintenance of the line below FRA class I standards.

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[22] The $25,000 figure appears to have resulted from an error in multiplication since 285,000 bushels of grain were involved. We also note that in its complaint WFEC based the first two elements of its damage request on shipment of 700,000 bushels of grain during 1975 and 1976 by motor carrier, later amending the request to that describe above. Moreover, in its complaint, WFEC did not request any damages for decline in the value of its grain when dumped on the ground.

WFEC has not proven damages. Its request for damages is deficient in two significant respects. First, WFEC has not given sufficient supporting detail to establish the amount of damage suffered. *Harrison Eng. & Const. Corp.* v. *A. T. S. F. Ry.*, 78 F. Supp. 906, 912 (W. D. Mo. 1948). Complainant alleges that the cost of transporting grain by motor carrier has been consistently 2 cents per bushel greater than the cost of transporting grain by rail; and that differentials in prices paid by terminals for grain transported by motor carrier averaged 4 cents per bushel less than those paid for grain transported by rail over the same period. WFEC has submitted no specific comparisons of rail and motor carrier rates over the period in question, or comparison of the prices paid for grain shipped by each respective mode; rather it relies on assumptions. Such price comparisons are needed and, moreover, would have to be correlated with specific refusals to supply service and equipment by the carrier, and the subsequent shipment of that grain by motor carrier. It is determinative of WFEC's complaint that no specific information was submitted to support its claim that motor carrier rates are significantly higher on average than rail rates for transportation of like grains to similar destinations. North Western submitted some information on rail-motor carriers rate comparisons which indicates that the rates are similar or slightly higher for motor carrier transportation of corn, analyzing a few random price quotations. Rates for the transportation of soybeans by motor carrier appear to be considerably less than rates for rail transportation of this grain when comparisons are made. Simiarly, the claim that grain was damaged in the amount of 10 cents per bushel by being dumped on the ground is also insufficiently substantiated.

The second major deficiency in the request for damages is the inconsistency of the figures upon which they are based. In its complaint WFEC stated that at least 90 percent of its grain would have been shipped by rail if service and cars had been made available by North Western. However, in its initial verified statement WFEC computed damages based on the hypothesis that all of its grain would have been shipped by rail except for the service failures of North Western. Damages are computed on the difference in charges when shipped by motor carriers. Thus, WFEC states that only 60 percent of the shipments tendered to North Western in 1973 were transported by it; 27 percent in 1974; 32 percent in 1975; 37 percent in 1976; and 25 percent in 1977. All years coincide with

WFEC's fiscal year ending June 30. As stated earlier, serious questions arise concerning the validity of these figures because in its verified statement, in the prior abandonment proceeding, AB-1 (Sub-No. 20), WFEC stated that prior to 1970, 90 percent of its traffic was shipped by rail, that it would ship this percentage or more if adequate levels of service were provided by the North Western, and that it had shipped 70 percent of its tonnage by rail in 1973, 50 percent in 1974, and 66 percent in 1975. Thus, for the same fiscal years, WFEC has submitted two significantly different sets of figures for rail use. Since WFEC's theory of damages in the complaint proceeding is that it should be awarded damages based on the difference between the percentage of bushels actually shipped by rail, and 100 percent rail usage, the discrepancies between the figures in this proceeding and the abandonment proceeding in AB-1 (Sub-No. 20) cast serious doubts on the validity of complainant's claim for damages.

Again, we emphasize that damages must be traced directly to the carrier's failure to maintain the line at FRA class I levels, and that the failure to provide service and equipment and the resulting transportation by motor carrier must be related to an analysis of precise comparisons of motor carrier and rail rates to determine if additional costs were, in fact, incurred as a result of the railroad's refusal to provide such service and equipment.

Complainant also asks that we award costs and attorneys' fees. We have no power to make such an order. *Hightower Box & Tank Co., Inc., v. Alabama G. S. R. Co.*, 294 I.C.C. 503 (1955).

FINDINGS

We find that our jurisdiction under section 1(4) of the Interstate Commerce Act and a carrier's duty to furnish transportation upon reasonable request and adequate car service requires that Chicago and North Western Transportation Company upgrade the Lake Crystal-Winnebago line, to minimum class I standards established by the Federal Railroad Administration (49 CFR 213) and supply equipment and provide service compatible with these standards, as outlined in this decision. The complainant has not shown that it is entitled to any other affirmative relief, or that such relief is warranted, or proven damages with the specificity necessary.

This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

Commissioner Murphy dissenting.

It is ordered:

(1) Chicago and North Western Transportation Company shall upgrade the Lake Crystal-Winnebago line to minimum class I standards and supply equipment and provide service compatible with these standards.

(2) Within 30 days of the effective date of this decision Chicago and North Western Transportation Company shall submit to the Commission a plan for upgrading this line to the extent provided for in this report.

(3) This proceeding is discontinued.

FINANCE DOCKET NO. 28614 (SUB-NO. 1)[1]

NEWRAIL COMPANY, INC.—PURCHASE—THE WESTERN PACIFIC RAILROAD COMPANY

Decided January 4, 1979

1. In Finance Docket No. 28614 (Sub-No. 1), (a) Newrail Company, Inc., Newsacno Co., Inc., and Newtide Co., Inc., are authorized (i) to purchase the assets and operate the lines of railroad of the Western Pacific Railroad Company, Sacramento Northern Railway, and Tidewater Southern Railway Company, respectively; and (ii) to acquire the sellers' interests in leases and contracts to operate the properties of other carriers, and trackage rights over, and joint ownership in and use of, lines and involved terminals of other carriers; (b) Newrail Company, Inc., is authorized to control carriers now controlled by the Western Pacific Railroad Company (excluding Sacramento Northern Railway and Tidewater Southern Railway Company); and (c) Robert G. Flannery, John J. Gray, Robert C. Marquis, Roger G. Meldahl, Richard W. Stumbo, Jr., Walter G. Treanor, and Alexis P. Victors, are authorized to control Newrail Company, Inc., Newsacno Co., Inc., and Newtide Co., Inc., for a period not to exceed 5 years from the date of consummation of the transaction; all subject to conditions.
2. In Finance Docket No. 28614 (Sub-No. 2), (a) Newrail Company, Inc., Newsacno Co., Inc., and Newtide Co., Inc., are authorized to (i) issue common stock and (ii) assume obligation and liability in respect of securities issued or guaranteed by the involved railroads, and (b) Newrail Company, Inc., is authorized to enter into Second Supplemental Indentures with Trustees, relating to The First and Refunding Mortgage and Income Debentures of The Western Pacific Railroad Company.
3. In Finance Docket No. 28911, Robert C. Marquis is authorized to hold the positions of director and vice president-operation of Newrail Company, Inc., Newsacno Co., Inc., and Newtide Co., Inc., while holding present positions in the existing Western Pacific Railroad Company system.

Edward K. Wheeler, Eldon S. Olson, and *Walter G. Treanor* for applicants.

Harold A. Ross for protestant Brotherhood of Locomotive Engineers.

Peter M. Shannon, Jr., Stanley M. Braverman, and *James R. Taylor* for the Bureau of Investigations and Enforcement.

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[1] This decision also embraces Finance Docket No. 28614 (Sub-No. 2), Newrail Company, Inc.—Issuance of Securities and Assumption of Obligation and Liability, and Finance Docket No. 28911, Application of Robert C. Marquis, Under Section 20(a)(12) of the Interstate Commerce Act.

Decision

By the Commission:

Overview

Since 1972, the Western Pacific Railroad Company (Western Pacific) has been a wholly owned subsidiary of Western Pacific Industries, Inc. (Industries). Western Pacific, one of the smaller class I rail carriers in this country, is subject to this Commission's jurisdiction. Industries, which is not subject to the Commission's jurisdiction, is a holding and management company whose subsidiaries include Western Pacific and Veeder Industries, Inc. which manufactures counting, controlling, indicating, and recording devices and industrial components.[2]

Under the proposal before us, Industries would spin off Western Pacific and Western Pacific's subsidiaries. To this end, a new corporation, Newrail Company, Inc. (Newrail), has been formed. Newrail proposes, along with several of its subsidiaries (also newly formed), to purchase the assets of Western Pacific and its subsidiaries. The Newrail group would continue the operations of the existing Western Pacific system. The purchase price of approximately $118 million (based on figures available as of June 30, 1978) for substantially all of Western Pacific's assets includes approximately $104 million in liabilities and obligations assumed and $14 million in cash. The cash would be raised through stock issuance. Newrail proposes to issue two classes of common stock. Class A common stock would be sold to the general public. Class B common stock, representing less than 1 percent of the equity in Newrail, would be sold to designated Newrail officers and directors, who are now officers or directors, or both, of companies in the Western Pacific system. The class B shareholders would elect a majority of Newrail's board of directors for the first 5 years of Newrail's operation.

We find that the proposed transaction, subject to certain conditions to be discussed, (1) meets the requirements of sections 10901, 11344, and 11301 of Title 49, Subtitle IV, of the United States Code[3] (Code), formerly sections 1(18), 5(2), and 20a, respectively, of the Interstate Commerce Act (act), and (2) conforms generally with the purposes and objectives of the national transportation policy declared by Congress.

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[2] See the orgranization chart in appendix A to this decision.

[3] Public Law 95-473, enacted October 17, 1978, revised and codified the Interstate Commerce Act.

THE APPLICATIONS

Finance Docket No. 28614 (Sub-No. 1).—On March 21, 1978, Newrail and Western Pacific filed an application under section 5(2) of the act (now section 11344 of the Code) for authority for Newrail, a noncarrier, to purchase the assets of Western Pacific, including trackage rights over, and joint use of, lines owned or operated by other carriers. Newrail also seeks authority under section 1(18) of the act (section 10901 of the Code) to operate the lines of railroad presently operated by Western Pacific.

By the same application, Newsacno Co., Inc. (Newsacno) and Newtide Co., Inc. (Newtide), both noncarrier corporations to be wholly owned by Newrail, have applied under the same sections of the act for authority to purchase the assets and operate the rail lines of the Sacramento Northern Railway (Sacramento) and Tidewater Southern Railway Company (Tidewater), respectively, which are wholly owned rail carrier subsidiaries of Western Pacific. As part of the transaction, Newstan Co., Inc. (Newstan), a wholly owned noncarrier subsidiary of Newrail, would purchase the assets of Standard Realty and Development Company (Standard), a noncarrier subsidiary of Western Pacific. These assets include the stock of Western Pacific Transport Company (Transport), a motor carrier subject to the Commission's jurisdiction.

Seven prospective class B shareholders of Newrail, who will have the power to control Newrail during its initial 5 years of operation, have joined in the application.[4]

Finance Docket No. 28614 (Sub-No. 2).—Also on March 21, 1978, Newrail, Newsacno, and Newtide filed an application under section 20a of the act (section 11301 of the Code) for authority for each (1) to issue common stock and (2) to assume obligation and liabilities in respect of securities issued, assumed or guaranteed by Western Pacific, Sacramento and Tidewater, respectively.

Finance Docket No. 28911.—By application filed November 29, 1978, Robert C. Marquis seeks authority under section 20a(12) of the act (now section 11322(a) of the Code), to hold the positions of director and vice president-operation of Newrail, Newsanco, and Newtide, while holding the following positions with other carriers:

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[4] The seven individuals are Robert G. Flannery, John J. Gray, Robert C. Marquis, Roger G. Meldahl, Richard W. Stumbo, Jr., Walter G. Treanor, and Alexis P. Victors.

(1) vice president-operation of Western Pacific, (2) director and vice president-operation of Sacramento and Tidewater, (3) director of Central California Traction Company, and (4) director and vice president of (a) Alameda Belt Line and (b) The Oakland Terminal Railway.

PROCEDURE

We accepted the purchase application as being in substantial compliance with the Railroad Consolidation Procedures (Regulations)[5] as modified by the waiver granted to the applicants by report and order in Finance Docket No. 28614 served February 8, 1978. Appropriate notice of the filing of the applications was published in the Federal Register on April 5, 1978.

Several comments to the application were filed and applicants replied. We set the matter for handling under the modified procedure by a decision served July 17, 1978. In directing the parties to comply with the modified procedure, we directed them to answer 27 questions focusing on the financial ability of Newrail, Newsacno, and Newtide to provide adequate service to the public as common carriers by railroad and on the fitness of the current officers of the Western Pacific to assume control of Newrail and its subsidiaries. We also directed the Commission's Bureau of Investigations and Enforcement (BIE) to participate and develop the record on this public interest aspect.

The applicants and only one protestant, the Brotherhood of Locomotive Engineers (BLE), filed verified statements supporting their respective positions. BIE also filed a verified statement. The American General Bond Fund, Inc., American Capital Bond Fund, Inc., and Provident Fund for Income, Inc. (the American General Group), who had raised in their comments the most serious questions as to the propriety of the applications, did not participate in the modified procedure. The applicants submitted verified statements in reply to those of BIE and BLE.[6]

In setting this matter for handling under the modified procedure, we decided that the determination of the merits will be made in the first instance by the entire Commission pursuant to section

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[5] See *Railroad Consolidation Procedures*, 348 I.C.C. 771 (1977) and the Railroad Acquisition, Control, Merger, Consolidation, Coordination Project, Trackage Rights and Lease Procedures, 49 CFR Part 1111.

[6] No party totally opposes the applications. Reference to the position of BIE or BLE will be made only where there is a dispute.

5(2)(g)(vi) of the act (section 11345(e) of the Code). In such a case the decision is final within the meaning of section 10327 of the Code. Accordingly, this decision will be final within the meaning of section 10327 on the day it is served.

JURISDICTION

We have jurisdiction over these applications under sections 10901, 11344, and 11301 of the Code (formerly sectons 1(18), 5(2), and 20a of the act). In *North Western Employees—Pur.—Chicago & N. W. Ry. Co.*, 342 I.C.C. 58, 64 (1972) (*North Western Employees*), on analogous facts, we found jurisdiction under section 5(2) where a noncarrier buyer (Netco) sought to acquire the seller's leases of, and trackage or joint use rights over, the lines of other railroads. Similarly, in the instant case, Newrail seeks authority to acquire the Western Pacific's leases of, and trackage or joint use rights over, the lines of other railroads. Thus, jurisdiction attaches under section 11344 of the Code.

Additionally, we recognized in the *North Western Employees* case that jurisdiction lies under section 1(18) of the act where a noncarrier corporation proposes to engage in railroad operations. Here, three noncarrier corporations seek authority to take over the railroad operations of Western Pacific, Tidewater, and Sacramento. Accordingly, jurisdiction lies under section 10901 of the Code.

Our jurisdiction to regulate the securities issuance by Newrail, Newtide, and Newsacno attaches under section 11301 of the Code. Section 11301 requires all corporations organized for the purpose of engaging in transportation by railroad, to obtain Commission approval prior to issuing securities. Newrail, Newtide, and Newsacno, as corporations formed for the purpose of engaging in transportation by railroad, are thus subject to the securities provisions. Under section 11322 of the Code, we must consider whether Mr. Marquis may hold positions as director and officer in separate carrier systems.

BACKGROUND

As of June 30, 1978, applicants Western Pacific, Sacramento, and Tidewater, as a system operated 1,266 miles of first main line, 237 miles of second main line, and 216 miles of branch line track in California, Nevada, and Utah. Of the 1,719-mile total, 385 miles were operated under trackage rights. The Western Pacific's main line, extending eastward from San Francisco-Oakland, joins the lines of the Denver and Rio Grande Western Railroad Company and the Union Pacific Railroad Company (UP) at Salt Lake City, forming a western link in transcontinental freight service by connection with other carriers. Western Pacific's line between Stockton and Bierber, CA, forms the middle segment of a three-carrier freight service with Burlington Northern, Inc. (BN) and The Atchison, Topeka and Santa Fe Railway Company, connecting the Southwest and California with the Pacific Northwest and Western Canada. Principal cities served include: San Francisco, Oakland, Fremont, Stockton, Sacramento, and San Jose, CA, Reno, NV, and Salt Lake City, UT.

AGREEMENT FOR SALE OF ASSETS

General.—Under the terms of the agreement dated February 16, 1978, substantially all of the business as a going concern, assets, properties and rights of every kind and description of Western Pacific, Sacramento, Tidewater, and Standard will be purchased by Newrail, Newsacno, Newtide, and Newstan, respectively.[7] The consideration to be paid consists of (1) the assumption by Newrail and its subsidiaries of substantially all the debts, liabilities, obligations, duties, mortgages, and indentures supplements and bonds and debentures issued by Western Pacific and its subsidiaries,[8] and (2) the payment of $14 million cash.

The contract provides that the amount of liabilities to be assumed is to be adjusted to reflect the business activities of the sellers between September 30, 1977 and the end of the month preceding the month in which closing occurs. Since the liabilities assumed make up the bulk of the consideration and the liabilities fluctuate as the sellers carry on business, the total purchase price cannot be absolutely determined from day to day. On September 30, 1977, the total purchase price would have been $88,228,000, of which $74,228,000 represented liabilities assumed and $14 million would have been the cash due. The total assets to be acquired were valued at $88,228,000 at that time. Later, on December 31, 1977, the total price for the assets was $117,016,000, of which $103,016,000 represented the liabilities to be assumed. According to Form S-1, the Registration Statement filed with the Securities and Exchange Commission, the total price as of June 30, 1978, would have been $118,478,000. While a specific dollar amount for the purchase price would be easier to work with, that seems impossible here where the transaction involves a going concern and substantial amounts of liabilities are to be assumed. For analysis purposes, we will focus on those dates where the record furnishes the most detailed breakdowns of the assets to be purchased and the liabilities to be assumed.

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[7] Excepted from the sale are (1) the capital stock of Sacramento, Tidewater, and Standard, (b) any claims or rights of Western Pacific, Sacramento, Tidewater, Standard, Delta Finance Company Ltd. (Delta), and Transport with respect to Federal or State income and franchise taxes, and (c) accounts and loans receivable of any seller (Western Pacific, Sacramento, Tidewater, or Standard) from any other seller.

[8] Under the sale agreement, Newrail and its subsidiaries will assume all debts and obligations of Western Pacific and its selling subsidiaries except any (a) liabilities of Western Pacific, Sacramento, Tidewater, Standard, Delta, and Transport under the Internal Revenue Code of 1954, as amended, or any other income or franchise tax statute whether arising by reason of their inclusion in the consolidated income or franchise tax returns filed by Industries or Western Pacific or otherwise for any taxable year up to and including the effective date or otherwise, (b) liabilities for any Federal, State, or local income, franchise, sales, use, transfer, excise, or other tax, assessment or charge based upon or measured by or arising out of the sale, assignment, conveyance, transfer or delivery pursuant to the sale agreement except, with respect to sales taxes, as provided in section 11.4.1(C) of the sale agreement, (c) liabilities of Western Pacific, Sacramento, Tidewater, Standard, Delta, and Transport to their shareholders arising out of their relationship as shareholders, (d) liabilities of Western Pacific, Sacramento, Tidewater, and Standard resulting from a breach or violation of the sale agreement by them, (e) liabilities of Western Pacific, Sacramento, Tidewater, and Standard arising by reason of section 11.4 of the sale agreement, and (f) accounts and loans payable by any seller (Western Pacific, Sacramento, Tidewater, or Standard) to any other seller.

Assets to be acquired by Newrail and Subsidiaries.—The most detailed breakdown of the assets to be acquired by Newrail and its subsidiaries is shown in the record for September 30, 1977. On that date the assets to be sold to Newrail totaled $79,195,000. These assets consist of: $46,494,000 in cash and cash equivalents, $30,052,000 in transportation property, $2,311,000 in other property, $107,000 in inventories, $77,000 in notes and contracts receivable, and $154,000 in investments in affiliated companies.[9]

On September 30, 1977, the assets to be sold to Newsacno totaled $3,365,000 ($3,331,000 in cash and cash equivalents, $13,000 in transportation properties, and $21,000 in other properties). On the same date, the assets to be sold to Newtide totaled $807,000 ($771,000 in cash and equivalents, $1,000 in notes and contracts receivable, $3,000 in transportation properties, and $32,000 in other properties), and the assets to be sold to Newstan totaled $4,861,000 ($285,000 in cash and equivalents, $91,000 in notes and contracts receivable, $2,917,000 in miscellaneous properties, and $1,568,000[10] in investments in affiliated companies.)

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[9] One hundred and fifty-four thousand dollars reflects the purchase price of the investments in affiliated companies. According to applicants, the fair market value of these assets at September 30, 1977, was $180,053. Since that time, Western Pacific has disposed of its stock in The Salt Lake City Union Depot and Railroad Company, one of these affiliates. Submitted figures indicate that both the purchase price and fair market value of this stock was approximatley $18,000.

[10] This figure reflects a purchase price of $1,315,000 for the stock of Transport and a $253,000 purchase price for the stock of Delta.

Had the transaction been consummated on September 30, 1977, the total aggregate purchase price paid by all buyers would have been $88,228,000.

Also, as part of the transaction, Newrail, Newsacno, and Newtide will acquire the trackage rights over, and joint ownership in and joint use of, lines owned or operated by other carriers, including BN, UP, and Southern Pacific Transportation Company (SP), that Western Pacific, Sacramento and Tidewater possess. Jointly used facilities include significant portions of Western Pacific's line between San Francisco and Salt Lake City. SP uses 27 miles of Western Pacific's tracks between Marysville, CA, and Oroville, CA; SP and Western Pacific operate jointly on 151 miles of Western Pacific's tracks between Flanagan, NV, and Weso, NV; between Weso, NV, and Alazon, NV, a distance of 178 miles, Western Pacific and SP operate on Western Pacific tracks eastbound and on SP tracks westbound; Western Pacific and UP operate over their own and each other's tracks both eastbound and westbound on the 15-mile stretch between Salt Lake City, UT, and Garfield, UT.

Exhibit 9-F to the application in Finance Docket No. 28614 (Sub-No. 1) lists the various joint facilities agreements previously filed with the Commission. Exhibits 9-G through 9-U, inclusive, to that application, set out the other pertinent joint facility agreements.

Assumed liabilities and cash consideration.—The most detailed breakdown of the liabilities to be assumed by Newrail and its subsidiaries is shown in the record for December 31, 1977. On that date, Newrail alone would have assumed $19,528,838 in equipment obligations and $19.9 million in first mortgage series B bonds net of discount.[11] Newrail would also have assumed $31,909,000 in current liabilities and $26,416,162 in other liabilities, which include $5,130,000 in income debentures and unfunded pension liability. Based on these figures, Newrail alone would have assumed $97,754,000 in liabilities as of December 31 1977.

Newsacno will assume obligations and liabilities of Sacramento which, as of December 31, 1977, consisted of current liabilities of $1,769,000 and other liabilities of $626,000. Newtide will assume obligations and liabilities of Tidewater which, as of December 31, 1977, consisted of current liabilities of $490,000 and other liabilities of $99,000. Newstan will assume obligations of Standard, which as of

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[11] Newrail would also assume obligation and liability on $14,275,000 principal amount of first and refunding mortgage bonds, series A, due January 1, 1981, but an amount sufficient to pay these bonds plus interest at maturity has already been deposited with the trustee under the indenture. Pursuant to generally accepted accounting principles, neither the funds set aside nor the outstanding series A bonds are shown on Western Pacific's balance sheet as of December 31, 1977.

December 31, 1977, included long-term debt of $344,965, current liabilities of $104,000 and other liabilities of $88,035.

The contract of sale provides that the $14 million in cash, to be paid by the buyers to the sellers, is to be allocated according to the proportion that the net value of the assets of each seller bears to the total net value of the assets of all sellers. As of September 30, 1977, Newrail, Newsacno, Newtide, and Newstan, respectively, were to pay $9,473,000, $945,000, $281,000 and $3,301,000 to their respective sellers.

FIANANCING ARRANGEMENTS AND SECURITIES APPLICATION

Stock issuance by Newrail.—To finance the cash portion of the transaction Newrail proposes to issue 1.4 million shares of class A stock to the general public at $10 a share. Each share of this class A common stock will have a $5 par value. Each share will be entitled to one vote. The class A shareholders will be entitled to elect four of the nine directors of Newrail during the first 5 years ater the first issuance of class A stock. After this period, the class A shareholders will elect all nine directors. No holder of class A stock shall have any preemptive, preferential or other right to purchase Newrail's stock. The stock is nonconvertible and not redeemable.

To insure continuity in management in the ownership transition, Newrail seeks authority to issue not exceeding 10,000 shares of class B stock of $5 per share par value to seven key officers at a price of $10 per share.[12] Of these, 5,001 shares are proposed to be offered to Robert G. Flannery. The terms of the class B stock are the same as those for class A with several exceptions. During these first 5 years, the class B shareholders shall be entitled to elect five of the nine directors. No class B shareholders may cumulate his votes. Class B stock will not be transferable except to Newrail or with Newrail's consent to other class B shareholders, or to an officer employee assuming the position of a class B shareholder. At the end of 5 years after the date of first issuance of class A stock, each outstanding share of class B stock shall be redeemed by Newrail or converted into class A stock at the option of the holder. The holders of class A and class B stock are entitled to dividends at the same rate, payable at the same time. Each class A or class B shareholder is entitled to participate equally in liquidation.

Newrail also seeks authority to issue 10,000 shares of class A common upon the possible conversion of class B stock into class A stock.

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[12] These officers are listed in footnote 4.

To provide incentive for its employees to improve Newrail's operations, and to attract and retain qualified employees, Newrail proposes to issue options to purchase 155,555 shares of class A stock to officers and key employees of Newrail and its subsidiaries. The options are to be granted in the discretion of the board of directors. Of the total options, 120,000 shares will be reserved for holders of class B stock. The price will be determined by the board of directors but will not be less than the fair market value of the shares of stock at the time the option is granted. The options must be exercised within 10 years of the grant. They must be exercised during the optionees' employment with Newrail or within 90 days after termination, if death or disability causes termination, or 1 month after termination, if Newrail terminates the employment.

Altogether, Newrail proposes to issue 1,565,555 shares of class A common stock and 10,000 shares of class B common stock.

Stock issuances by Newrail subsidiaries.—To provide Newsacno, Newtide, and Newstan with the necessary funds to purchase the assets of their counterparts, Sacramento, Tidewater, and Standard, respectively, and to accomplish Newrail's 100 percent control of the new companies, the applicants propose that Newsacno and Newtide each issue 10,000 shares of common stock (with a $10 per share stated value) to Newrail. We find that Newrail will pay to Newsacno, Newtide, and Newstan[13] the stated value and an amount in excess of stated value sufficient to enable Newsacno, Newtide, and Newstan to purchase the assets of their counterparts.[14]

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[13] Newstan was not required to join in the application because it is not a carrier and not an initiating party. See Finance Docket No. 28614, New Railroad Company—Purchase—Western Pacific Railroad Company, served February 8, 1978.

[14] On this point there are inconsistencies in the application. The application in Finance Docket No. 28614 (Sub-No. 2) states that the stock of Newtide and Newsacno will be sold to Newrail at a price of $10 per share. At this price Newtide and Newsacno would each receive $100,000. However, the application also states that the proceeds received by Newsacno, Newtide and Newstan will be used by them to purchase the assets of their counterparts as set forth in the sale agreement. Under the sale agreement, if the transaction were consummated on September 30, 1977, Newsacno, Newtide, and Newstan would be obligated to pay cash of $945,000, $281,000, and $3,301,000, respectively. The proceeds from the issuance of the stock would not cover these outlays. Moreover, issuance of such stock for $10 per share is inconsistent with the *pro forma* balance sheets submitted for Newsacno, Newtide and Newstan, which show shareholder equity substantially in excess of $100,000. The respective *pro forma* balance sheets as of December 31, 1977, show shareholder equity of $767,000, $281,000 and $3,496,000 for Newsacno, Newtide, and Newstan, respectively. We find it more consistent with the overall scheme of the application that Newsacno, Newtide, and Newstan will issue stock for a price which equals the aggregate cash portion of the amount owned by Newsacno, Newtide, and Newstan to their selling counterparts. This will insure that all of the $14 million raised by the issuance of Newrail's class A stock will be applied toward the purchase. If this is not the case, applicants should file a petition to modify the application so that the terms and conditions upon which we approve the application conform with those proposed by the applicants.

Each share of common stock of Newsacno and Newtide is entitled to one vote. A shareholder of Newsacno or Newtide may cumulate votes when electing directors. No holder of Newsacno common stock or Newtide common stock will have any preemptive, preferential or other right to purchase or subscribe to any shares of Newsacno or Newtide respectively. There are no conversion privileges. Each share of stock entitles its owner to share equally in the event of dissolution.

Assumption of obligations.—Newrail, Newsacno, and Newtide seek authority under section 20a to assume substantially all of the debts and obligations of the counterparts as previously described.

Additionally, Newrail and Western Pacific propose to enter into a Second Supplemental Indenture with Crocker National Bank, Trustee under Western Pacific's first and refunding mortgage and the First Supplemental Indenture securing Western Pacific's repayment of the $14,275,000 principal amount first and refunding mortgage bonds, series A, due January 1, 1981, and $20 million principal amount first mortgage bonds, series B, due 2002, outstanding on December 31, 1977. The Second Supplemental Indenture will provide for the succession of Newrail to Western Pacific's obligations. Under the terms of the Indenture, Newrail will pledge with the trustee the stock of Newstan, Newsacno, and Newtide, when issued, together with any securities acquired by Newrail in the transaction, which are already pledged to the trustee, to insure repayment.

Also, Newrail and Western Pacific propose to enter into a Second Supplemental Indenture with the Bank of America National Trust and Savings Association, trustee, under Western Pacific's Income Debenture Indenture and the First Supplemental Indenture, securing repayment of $5,130,000 debentures outstanding on December 31, 1977. The Second Supplemental Indenture will provide for the succession of Newrail to Western Pacific's obligations.

Expenses of issuance.—Applicants estimate that the expenses of issuance to Newrail, Newsacno, and Newtide will be $60,250. The sale agreement provides that the sellers (Western Pacific and its subsidiaries) will pay all underwriting discounts, fees, and commissions charged in connection with the public sale of Newrail's capital stock. The sellers will also pay the first $500,000 of sales taxes. All other expenses, including the fees of attorneys, accountants, appraisers, and sales expenses exceeding $500,000 will be shared equally by the buyers and sellers. Newrail, Newsacno, and

Newtide estimate that their half of the shared expenses will be $60,250.

DISCUSSION AND CONCLUSIONS

Applicable criteria.—As discussed earlier, these applications involve sections 10901, 11344, 11301, and 11322 of the Code. Under section 10901, we will authorize acquisition of a line of railroad where we find that the present or future public convenience and necessity require or will be enhanced by the acquisition. Under section 11344 we must decide whether the proposed transaction is consistent with the public interest. In considering this, we are concerned with the effect of the proposed transaction upon adequate transportation service to the public, the effect upon the public interest of the inclusion or failure to include other railroads, the total fixed charges resulting from the transaction, the interest of carrier employees, and the terms of the transaction (i.e., whether the terms are just and reasonable). In passing on the securities aspects of this case under section 11301, we must decide whether the transaction is for some lawful object within the applicants' corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicants of service to the public, and which will not impair their abilities to perform that service. Under section 11322, we must determine whether public or private interests will be adversely affected if Robert C. Marquis is permitted to serve as officer and director in both the Western Pacific System and the Newrail System.

Running through these provisions is a common theme—whether this transaction is consistent with the public interest. We will consider first this broad objective and then discuss other criteria as appropriate.

Public interest.—Applicants argue that the transaction is in the public interest because it will eliminate control of a carrier's (Western Pacific's) properties by a noncarrier holding company (Industries) and will vest those properties in a new carrier (Newrail), whose sole concern will be promoting its transportation operation. None of the parties find fault with this argument. BIE says that with appropriate conditions, the transaction would be consistent with the public interest. We agree.

In the past we have favored transactions where a noncarrier holding company would divest itself of its rail properties. In *North*

Western Employees, supra, at 72, we approved such a transaction because (1) the railroad would be entrusted to persons whose sole interest is the efficient and economical operation of the carrier, (2) the employees would be given an ownership interest in the company and would have an inducement to put forth greater effort and (3) it would remove the danger of improvident investments by a noncarrier parent which could adversely affect the carrier's financial condition. The instant transaction is similar to that found in *North Western Employees.*

The instant transaction would eliminate Industries' control of the rail properties of Western Pacific, Tidewater, and Sacramento. In the past, Industries has been unwilling to be a full partner in Western Pacific's transportation business. Western Pacific has obtained no direct financial benefit from Industries' ownership. Industries has neither become liable for nor guaranteed any of Western Pacific's debt. Industries has taken the position that Western Pacific can expect no financial help from it.

Since Industries plans to spin off its investment in Western Pacific it apparently has even less interest in the welfare of Western Pacific. Under these circumstances, continued control by Industries is not in the public interest. Industries could insist on Western Pacific's paying dividends when the railroad's funds could be better spent on railroad operations and development. On this point, Western Pacific's past dividend policy is significant. The application contains the letter opinion of Salomon Brothers, of December 14, 1977, as to the fair market value of the business and assets of Western Pacific. Based on historical results of Western Pacific's operations, Salomon Brothers concluded that an annual dividend in the range of $1.1 million to $1.3 million would be sustainable by Newrail. It follows that a similar level of dividends would be reasonable for Western Pacific. Yet, in 1976, 1977, and 1978 Western Pacific declared dividends of $2 million, $3 million, and $2.4 million respectively, or an average of approximately $2.47 million annually. Divestiture by Industries will remove the possibility that Industries will require Western Pacific to pay dividends in a particular year at the expense of adequate maintenance, an adequate fleet and adequate service to shippers. The proposal will remove any possibility that Industries will make improvident investments causing it to pursue dividend policies adversely affecting Western Pacific's (Newrail's) financial condition or impairing its ability to perform its common carrier duties.

Approval will insure that the dividend decisions will be made by persons who will place first the needs of the railroad to improve its property, increase the supply of its equipment, and increase working capital. Initially, Newrail's management says it intends to hold annual dividends to around $1,190,000.

Approval will also give Western Pacific employees a significant interest in the success of Newrail. Industries now owns all of Western Pacific's stock and there is little opportunity for employees to participate in ownership. Approval of this application would enable employees at all levels to own Newrail stock. Initially, Newrail proposes to issue 10,000 shares of class B stock to seven key officers of Newrail. The class B stockholders[15] may also receive options to purchase an additional 120,000 shares of class A stock. During the first 5 years of Newrail's operation Robert G. Flannery, president of Newrail, will control Newrail because his ownership of 5,001 shares of class B stock will enable him to elect five out of nine directors (since there is no cumulative voting of class B shares).

Stock options to purchase another 35,000 shares of class A stock are proposed to be issued to other officers and key employees of Newrail and its subsidiaries. If these options are offered and exercised according to plan, it is conceivable that after the initial 5-year period, key officers and employees of Newrail and its subsidiaries will hold 165,555 out of the 1,565,555 shares of common stock outstanding, or approximately 10 percent of Newrail's stock. Additionally, Newrail proposes to institute an employee stock purchase plant. Every employee will be entitled to authorize 2, 4, 6, 8, or 10 percent of his base compensation to be deducted from his salary. These deductions would be transferred to a broker who will purchase shares of Newrail's class A stock on the open market for the benefit of each participating employee. If Newrail's 2,800 employees embrace this plan, it is conceivable that an even greater concentration of ownership will be bested in Newrail's employees.

The instant proposal differs from the proposal in ***North Western Employees, supra,*** in that not all of the stock is being offered to railroad employees. However, since no nonemployee group will control Newrail during its first 5 years of operations, we believe that

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[15] The holders of this stock would include Robert G. Flannery, president and chief executive officer of Western Pacific, Richard W. Stumbo, Jr., vice president-fiannce, Walter G. Treanor, vice president-law, John J. Gray president of transport, Robert C. Marquis, vice president-operation, Roger G. Meldahl, vice president-marketing, and Alexis P. Victors, vice president-industrial development of Western Pacific.

Newrail's employees will have a stake in the company sufficient to provide increased motivation to operate the railroad efficiently and to provide the best possible service to the public.

The employee stock purchase and stock option plans should attract new personnel, as needed, for key positions with the new railroad system. These plans should aid Newrail in its competition with other industries for the services of competent managers.

Finally, the plan should enable Newrail's management to make decisions unfettered by any pressure from Industries. Upon consummation, Messrs. Flannery, Stumbo, Treanor, and Brew, as well as other Newrail officers who now hold positions with Industries, Western Pacific, or a subsidiary, will resign all positions with those companies.

REASONABLENESS OF THE PURCHASE PRICE

A primary concern to us in this matter is whether the purchase price to be paid for the assets is reasonable. Our analysis of this point focuses on three areas: consideration of whether the purchase price was a product of arm's-length bargaining, comparison of the assets to be received by Newrail to the price of the assets, and evaluation of the tax benefits to be lost by the Newrail group.

Arm's-length bargaining.—Newrail and its subsidiaries presently share four officers or directors with Industries or Western Pacific. Robert G. Flannery is a director of Industries and William D. Brew is assistant secretary of Industries. Messrs. Flannery, Stumbo, Treanor, and Brew are also officers and/or directors of Western Pacific or its subsidiaries.[16] In Finance Docket No. 28613, *Application of Robert G. Flannery, Under Section 20a(12) of the Interstate Commerce Act* (not printed), decided February 2, 1978,[17] we authorized Robert G. Flannery to hold positions of director and president and chief executive officer of Newrail, Newsacno, and Newtide while holding positions with Industries, Western Pacific, and its subsidiaries. Similarly we authorized Walter G, Treanor to hold the positions of director and vice president-law of Newrail, Newsacno, and Newtide, Richard W. Stumbo, Jr., to hold the position of director and vice president-finance of Newrail,

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[16] See footnote 15.

[17] This order also embraced Finance Docket No. 28617, Application of Walter G. Treanor, Under Section 20a(12) of the Interstate Commerce Act, Finance Docket No. 28618, Application of Richard W. Stumbo, Jr., Under Section 20a(12) of the Interstate Commerce Act, and Finance Docket No. 28619, Application of William D. Brew, Under Section 20a(12) of the Interstate Commerce Act.

Newsacno, and Newtide, and William D. Brew to hold the position of corporate secretary of Newrail and its subsidiaries, all while retaining their respective positions with Industries, Western Pacific, and its subsidiaries. In that order, we cautioned the parties that we would examine closely the purchase price and the assets to be acquired in this transaction, to insure that the parties received fair and impartial representation.

Upon analysis we are satisfied that the purchase price was negotiated in a reasonable and fair manner. In arriving at the purchase price, steps were taken to insure that only those directors or officers who would ultimately remain with Industries and Western Pacific would negotiate on behalf of the sellers and only the directors and officers of Newrail would negotiate for Newrail and its subsidiaries. The purchase price and other terms of the purchase agreement were negotiated principally by Howard A. Newman, chairman of the board of directors and chief executive officer of Industries, acting on behalf of the sellers and Robert G. Flannery, acting on behalf of the buyers. Messrs. Flannery, Stumbo, Treanor, and Brew took no part in the decisions made by the boards of Industries and Western Pacific regarding the transaction. Also, Mr. Flannery and the other prospective owners of Newrail's class B stock have disposed of all their stock options in Industries. Mr. Flannery, Stumbo, and Treanor had disposed of their stockholdings in Industries prior to entering negotiations.

Steps were also taken to insure that Messrs. Flannery, Stumbo, Treanor, and Brew would not be influenced by virtue of their positions with Industries and the sellers. The Western Pacific board specifically authorized Messrs. Flannery and company to devote the necessary time to consider the proposal. The sellers paid all costs and expenses incurred by Mr. Flannery and company in negotiating the transaction including the costs of independent counsel. During the negotiations Newrail was represented by independent counsel. Thus, Mr. Flannery and the other Newrail officers were under no pressure to make any agreement by reason of the investment of their own funds. Mr. Flannery was given a 10-year contract with Western Pacific before the purchase and sale agreement was executed. Under that agreement Mr. Flannery was given a base salary of $175,000 through January 1, 1980, $190,000 from January 1, 1980 through December 31, 1981, with the annual amount increasing $15,000 per year on January 1, 1982 and on January 1, of every second year thereafter until expiration on December 31, 1987. He was also to receive incentive compensation equal to 1 percent of the company's pretax net operating profit. This employment agreement insured that Mr. Flannery's future relationship with Western Pacific would not depend on whether an agreement for the sale to Newrail could be reached.

The price was arrived at based on a study of the fair market value of the sellers' business and assets done by Salomon Brothers, a major investment banking firm experienced in handling the financial matters of numerous railroads. Salomon Brothers offered its opinion on December 14, 1977, that the fair market value of the sellers' assets would be between $13 million and $16 million, in addition to the assumption of all of the sellers' obligations.

The price was based on stock market approach where price is a function of the current market for the equity interest in the assets. Salomon Brothers relied on the considerations customarily used by securities analysts in evaluating the price at which stock can be sold to the public, including price-earnings ratios, dividend payout and other ongoing business expectations. The parties apparently chose a figure at the low end of the range of prices arrived at by Salomon Brothers. This reflects favorably on the reasonableness and fairness of the agreement reached. Additionally, Bear Stearns and Co., a member of the New York Stock Exchange and the American Stock Exchange believes that it can form a group of underwriters to make a firm commitment to purchase the stock. This commitment, when given, would establish that independent buyers view the purchase price as reasonable.

All factors considered, we are satisfied that the purchase price was arrived at by a fair and reasonable manner and was the product of arm's-length bargaining.[18]

Value of property acquired.—An analysis of Newrail's consolidated *pro forma* balance sheet prepared as of June 30, 1978, indicates that Western Pacific's properties would be written down by $125,933,000 as a result of the purchase. Western Pacific and its subsidiaries valued their consolidated net properties at $188,031,000 net book value, on June 30, 1978. These same assets will be valued by Newrail at $62,098,000. This substantial writedown in the book value of the assets does not detract from the reasonableness of the purchase price. As previously shown, the value of Western Pacific's assets were not individually appraised. Price was a function of the going concern value of the equity interest in Western Pacific.

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[18] On this point we note that the position of Robert Flannery is similar to the position of Larry S. Provo, in *North Western Employees, supra*, a transaction which we approved.

Although we accept the writedown, as reasonable, we recognize that it is not without cost to Newrail. We must consider the indirect consequences of the writedown to determine whether the total price is reasonable. One result of the asset writedown is that Newrail will have to pay increased taxes. Newrail and its subsidiaries will be entitled to take less depreciation than their predecessors. The *pro forma* income statements prepared for Newrail, Newsacno, and Newtide indicate reduced depreciation deductions in 1977 and the years following consummation of $916,000 in 1977, $886,000 the first year following consummation, $881,000 the second year, and $882,000 the third year. Accordingly, for the 4 years, depreciation will be reduced by a total of $3,565,000. Assuming a 46-percent marginal tax rate, applicable for 1979[19] Newrail and its subsidiaries will pay an additional $1,639,000 in Federal income taxes over the 4 years.[20] Since applicants point out that some of the depreciable property has a useful life of 11 years, there will be resulting tax consequences to Newrail for that period.

We are satisfied that the increases in taxes brought about by the asset writedown was considered when the purchase price was negotiateed. Howard A. Newman, chairman of the board of Industries, stated in his reply verified statement that the $14 million cash portion of the purchase price reflected a give and take on many items. It is not unreasonable for Newrail to incur the increased tax liability shown because the sellers agreed to accept an amount at the lower end of the price range recommended by Salomon Brothers, agreed to forgo dividends throughout the pendancy of the transaction, agreed to guarantee the receivables sold to Newrail, and agreed to pay all of the underwriter's discounts and commissions, the first $500,000 of sales taxes, and one half of other expenses.

We must also consider whether the asset writedown will lessen the value of the security held by creditors of Western Pacific and its subsidiaries. In their comments the American General Group stated that Western Pacific's assets were pledged as security for the repayment of Western Pacific's First Mortage 9 1/8 percent, series B bonds, of which they hold $5 million par value. They expressed concern that the writedown will lessen the value of the assets pledged to secure repayment and that the bond rating and resale value of the bonds will be adversely affected. We recognize that the bondholders represent one sector of the public whose interest we must consider. Investors must remain confident in Western Pacific or its successors in interest, if the railroad is to obtain credit in the future and continue serving the public.

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[19] See Revenue Act of 1978.

[20] There will also be a writedown in other property and a corresponding increase in income due to the increase in gain from the sale of this property. The net effect will be an increase in income before taxes of $1,040,000, $1,023,000, and $995,000 in the years 1978, 1979, and 1980, respectively, according to the applicants. This translates into increased taxes.

The fears of the American General Group are not justified. The writedown of the assets represents a change in form only. It was made necessary because the transaction is structured as a purchase. The resale value of individual assets is not affected by the transaction. The security of creditors such as the American General Group does not seem to be jeopardized. Since the purchase was announced, the rating on Western Pacific Bonds, and the ratings of Moody's and Standard and Poors on Western Pacific's equipment obligations have not fallen. While the price of Western Pacific's 9 1/8-percent series B bonds has declined since the instant proposal became public knowledge, the decline appears related to the general increase in interest rates rather than to the proposed sale.[21] The American General Group has shown by its own actions that the writedown will not affect their security or otherwise deter them from purchasing additional Western Pacific debt. This group purchased $500,000 worth of Western Pacific's first mortgage series B bonds on September 27, 1977, after Western Pacific had announced on September 23, 1977 that it proposed to sell its assets. That announcement was carried that day on the Dow Jones ticker and reported in the Wall Street Journal 3 days later. More significant, the American General Group purchased an additional $500,000 of the series B bonds on March 21, 1978, when it had full details of the proposed sale to Newrail. By then the purchase price of the bonds had dropped to $96.44. We are satisfied that the writedown will not adversely affect the interests of Western Pacific's creditors.

While we accept as reasonable the writedown of Western Pacific's net assets by $125,933,000, the allocation of the $62,098,000 assets the Newrail group will acquire its troubling. According to the *pro forma* balance sheet of Newrail as of June 30, 1978, set forth in the preliminary prospectus, Western Pacific's road property is to be reduced from $146,494,000 to $1,626,000. The purchase contract determines that the roadway has a fair market value of zero and allocates none of the price to roadway. This is inconsistent. We fear that such an allocation does not comport with economic reality and may mislead future investors. This is not in the public interest.

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[21] Prices have declined from a range of 100 3/8 to 101 per share in July 1977 to 92 3/8 on April 27, 1978. These effective interest rates are obtained in the market place by lowering the sale price of the bonds.

As a condition to our approval of this transaction, we will require Newrail to submit within 60 days of consummation, the accounting entries it proposes to make to give effect to the transaction. Newrail shall provide a detailed justification for the final allocation of the purchase price amount in its asset accounts, including a detailed justification for the proposed writedown in the road property account showing a comparison of the costs of removal and salvage values for each of the major components (rail, ties, roadbed, tunnels, bridges, and roadway equipment, et cetera) of the roadway account. Newrail's *pro forma* balance sheet included in its preliminary prospectus indicates that $1,859,000 of long-term debt was (or will be) issued prior to consummation of the proposed transaction. Applicants shall provide details concerning this debt, including borrowing terms, purposes of the issue and the actual or estimated date of issuance.

Nothing in this decision should be construed as approval by us of the accounting presented by applicants in the applications or of the proposed writedown of the road properties. Approval of the accounting (and writedown of the properties) is reserved for the consideration of the Commission's Bureau of Accounts following submission of the accounting entries required by this decision.

Forgone tax credits.—BIE maintains that Newrail will lose the benefit of certain investment tax credits presently available to Western Pacific upon consummation. BIE argues that Newrail should be compensated for the loss of these tax credits and that the value of these credits should be deducted from the purchase price and retained by Newrail. Industries has represented to the Commission that it intends to compensate Western Pacific for any of its tax benefits utilized by other members of Industries' consolidated group.[22] BIE cannot say whether Western Pacific has been compensated for these credits used by Industries or its other subsidiaries. However, BIE points out that Western Pacific's Annual Report for 1976 indicates it had unused tax credits on December 31, 1976 of $6,311,000. On June 30, 1978, Western Pacific's investment tax carryovers amounted to $5,202,000, all of which have been utilized by the Industries consolidated group, according to the Form S-1 Registration Statement prepared by applicants for submission to the Securities and Exchange Commission.

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[22] See Western Pacific's 1976 Annual Report at page 7, as set forth as exhibit 2-A in the application in Finance Docket No. 28614 (Sub-No. 1). In addition, the 1976 annual report, note 1 to the consolidated financial statements for the 6 months ended June 30, 1978, included at page R-6 of applicants' Form S-1 Registration Statement says: "WPI (Industries) intends to compensate WPR (Western Pacific) for any tax benefits which become unavailable to WPR as a result of their being utilized by other members of the consolidated group at the time such benefits could have been used by WPR."

Applicants refute BIE's arguments. According to Howard Newman, Western Pacific has been given the benefit of all investment credits it could have taken. Industries followed a practice of requiring Western Pacific and its subsidiaries to pay only that corporate tax which would have been due if Western Pacific was a separate entity. Western Pacific prepared its income tax returns as if it were independent of the consolidated group using all tax credits to which it was entitled. The tax so calculated was paid to Industries which submitted a consolidated return to the Internal Revene Service. As to the $5,202,000 in unused investment tax credits, available on June 30, 1978, he asserts that the Internal Revenue Code does not permit its transfer to Newrail. On the contrary, applicants,say, of the $7,211,000 estimated investment tax credits generated between 1972 and 1978 by Western Pacific, $5,831,000 will be subject to recapture or become unavailable. Mr. Newman insists that it would be inequitable for Industries to compensate Newrail for tax benefits neither Industries, nor Newrail may use upon consummation. Industries never promised to compensate Newrail for such tax benefits. Both Mr. Newman and Mr. Flannery argue that the price was arrived at in arm's-length bargaining in which the tax impact was considered. The price was a product of give and take on many items, including the tax considerations.

We are satisfied that Newrail should not be compensated for the investment tax credits previously available to Western Pacific. As to the tax credits previously utilized by the Industries consolidated group, we believe that Western Pacific has been adequately compensated. There is no evidence that Industries is siphoned off investment credits without compensating Western Pacific by reducing its share of the taxes owed by the consolidated group or that the railroad used fewer of the credits than it could have during any tax period. We believe, therefore, that the assets Western Pacific sold to Newrail have not been depleted through disproportionate payment of taxes by Western Pacific.

Moreover, Newrail has not been unfairly deprived of the unused investment credits available on June 30, 1978. BIE misreads the tax law controlling this transaction. I.R.C. 38 and 46 through 48 operate to recapture 100 percent of all the credits Western Pacific took on property purchased and held for less than 3 years, 66 and 2/3 percent of the credit taken on property purchased and held from 3 to 5 years and 33 1/3 percent of the credit allowed on property held for more than 5 years but less than 7 years. The applicants estimate that the amount of the investment tax credits that must be recaptured or will become unavailable is $5,831,000. The sellers, not Newrail, must include this in their income for the year of consummation. Western Pacific and the other sellers may not avail themselves of the unused investment credit.

We recognize that the successor railroads may be somewhat worse off than their predecessors because the unused investment credits will no longer be available. However, this was the consequence the Congress apparently intended to incur when any business sells property on which the investment tax credit was previously taken. The tax law favors neither buyer nor seller. Overall, the purchasers seem to be paying a fair price because the sellers agreed to accept a relatively low sales price (considering Salomon Brothers' recommendations), agreed to forgo dividends throughout the pendency of the transaction, and agreed to pay most of the expenses of the transaction. We find that it would not be in the public interest to modify the contract in the manner proposed by BIE where the tax consequences are outside the parties' direct control and benefit neither party, and where the price otherwise seems fair. We find that the purchase price is reasonable.

FINANCIAL FITNESS

The most important consideration in the transaction before us is whether Newrail and its subsidiaries will remain financially fit to carry out their common obligations. As will be shown, the sellers are comparatively healthy carriers at the present time. In this respect this proposal is a marked departure from the *North Western Employees* case, *supra*, where the sellers were marginal carriers. However, the question of financial fitness concerns us whether sellers are financially sound or not. It is incumbent on us to scrutinize the instant transaction to insure that Newrail's financial condition will be as sound as that of its predecessor. To this end, we must compare the historical financial statements of the Western Pacific system against the *pro forma* financial statements of Newrail and its subsidiaries.[23]

The consolidated balance sheets for Western Pacific as of December 31, 1977, and more recently on June 30, 1978, show that, historically, Western Pacific reported a healthy ratio of long-term debt to the combined total of long-term debt plus shareholder equity (debt/equity ratio), and a favorable excess of capitalizable assets over capitalization (excess capitalizable assets).[24]

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[23] We have analyzed those financial statements which were submitted on an entity basis as well as those presented on a consolidated basis. We have found that the consolidated statements adequately reflect the impact that the instant transaction will have on Newrail and its subsidiaries' ability to provide adequate service to the public as compared with its predecessors.

As of December 31, 1977, Western Pacific had total long-term debt of $64,495,000 and total shareholders equity of $124,198,000. Its debt/equity ratio was 34 percent. As of June 30, 1978, its total long-term debt amounted to $61,894,000 and its total shareholders equity amounted to $125,277,000. Its debt/equity ratio was reduced slightly to 33 percent debt on June 30, 1978. As of December 31, 1977, Western Pacific reported $207,626,000 in total capitalizable assets, consisting of $5,919,000 in working capital,[25] $188,465,000 in net properties, and $3,242,000 in investments in affiliated companies. Western Pacific reported total capitalization of $101,197,000 which included $5,707,000 in current maturities of long-term debt, $58,788,000 in long-term debt due after 1 year, $36,211,000 in capital stock, and $491,000 in premium on capital stock. Thus, on December 31, 1977, Western Pacific had excess capitalizable assets of $106,429,000. On June 30, 1978, Western Pacific had excess capitalizable assets of $106,933,000. It had total capitalizable assets of $205,529,000 consisting of $188,031,000 in net properties, $2,872,000 in investments in affiliated companies, and $14,626,000 in working capital.[26] On June 30, 1978, Western Pacific had capitalization of $98,596,000 consisting of $5,753,000 in current maturities of long-term debt, $56,141,000 in long-term debt due after 1 year, $36,211,000 in capital stock, and $491,000 in premiums on capital stock.

An analysis of Western Pacific's consolidated statements of income for each of the 5 years ended December 31, 1977, and for the 6 months ended June 30, 1978 shows that Western Pacific has been profitable in every year.[27] Western Pacific's operating revenues have increased by $37,659,000 between 1973 and 1977, from $89,578,000 in 1973 to $127,237,000 in 1977. This represents a 42-percent increase or an average annual increase of 10.5 percent. Operating expenses showed a slightly greater percentage increase, 43 percent, over the 5-year span. However, Western Pacific had an operating ratio (operating expenses divided by operating revenues) in 1977 of 93.8 percent. This is about equal to the 93.4-percent operating ratio of all western class I railroads and is significantly lower than the 96.7 percent operating ratio for all U.S. class I railroads as a whole.[28] The operating ratios indicate that Western Pacific is about as profitable based on operations as the average western class I railroad and more profitable than the average U.S. class I railroad.

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[24] The consolidated balance sheet as of December 31, 1977 is set out in the first column of appendix B. The consolidated balance sheet as of June 30, 1978 is set out in the first column of appendix C. Both balance sheets are set out because the former is more detailed and the latter is more recent.

[25] Working capital being current assets less current liabilities (excluding current maturities on capital leases and long-term debt).

[26] Working capital being current assets less current liabilities (excluding current maturities on long-term debt).

[27] Western Pacific's Consolidated Statements of Income are set out in appendix D.

Western Pacific's consolidated income statements also show that income before income taxes and extraordinary items increased 41.5 percent between 1973 and 1977, for an average annual increase of 10.4 percent. This was almost exactly equal to the yearly gain in operating revenues. For the year ended December 31, 1973 Western Pacific had income before income taxes and extraordinary item of $3,385,000. It increased to $4,790,000 by the year ended December 31, 1977. Net income rose from $3,115,000 in 1973 to $4,814,000 for the 12 months ended December 31, 1977 The average annual gain in net income of 13.6 percent exceeded the yearly increase in income before income taxes and extraordinary item because the effective tax rate went from 35.5 percent in 1973 to a credit in 1977.

For the 6 months ended June 30, 1978, Western Pacific had total operating revenues of $67,637,000, and net income after income taxes and extraordinary income of $3,479,000 which represented another improvement over the results of prior years. The railroad's operating ratio was 92 percent. There was a 14.1-percent improvement in operating revenues in the first half of 1978 compared with the first half of 1977. Operating income and net income showed gains of 60.6 percent and 131.3 percent, respectively, over results in 1977's first half. These improvements were due in part to a 6.6-percent improvement in carloadings and the benefit of general freight increases of 5 percent effective November 30, 1977 and 2 and 4 percent effective June 17, 1978. The increase in carloadings reflects improvements in the movement of intermodal traffic, grain products, motor vehicles, and general commodities.

Although these financial statements reflect favorably on Western Pacific, we are aware that this railroad is particularly vulnerable to economic downturns and has been hard pressed to improve its competitive position over the past few years. Western Pacific is subject to market fluctuations because a limited number of industries use the railroad. The three largest users of Western Pacific's services are Ford Motor Company, the United States Government, and United States Steel Corporation, which together accounted for approximately 25 percent of the railroad's total revenues in 1977. The two product groups that consistently account for most of Western Pacific's freight revenues are food products and transportation equipment.[29] In 1977 for example, these two product groups comprised 43 percent of the products shipped. Western Pacific's market vulnerability was demonstrated in 1975 and 1976 when net income before income taxes and extraordinary item fell to $1,837,000 and $1,911,000 respectively, when in 1974 the railroad had net income before income taxes and extraordinary item of $4,530,000. The operating results in these years reflected depressed economic conditions in 1975 and a strike in 1976 at the Ford Motor Company's San Jose, CA, assembly plant. Moreover, Western Pacific is highly dependent upon freight shipments moving through its connecting points with other rail carriers. As compared with many other class I railroads, Western Pacific has a higher percentage of intermediate traffic and a lower percentage of traffic which originates and terminates on its lines. An average of approximately 30 percent of the tonnage carried by the seller during the 5-year period ended December 31, 1977 was forwarded traffic which originated on-line and terminated off-line, approximately 31 percent was received traffic which originated off-line and terminated on-line, and approximately 33 percent was intermediate traffic which neither originated nor terminated on-line. Only 6 percent of the traffic was local traffic which both originated and terminated on-line.[30]

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[28] See appendix E for a comparison of Western Pacific's operating ratios with that of western class I railroads and all U.S. class I railroads.

Western Pacific has had difficulty improving its competitive position over the past 5 years. During the 5 years ended December 31, 1977, revenue ton-miles in millions (weight in lading times distance transported in miles) declined from 5,496 in 1973 to 4,967 in 1977. This 9.6-percent decline compared unfavorably with the industry. During the same period of time western class I railroads had a 1.2-percent increase. All U.S. class I railroads excluding Amtrak and Auto-Train had only a 3-percent decline.[31] Thus far, this decline in traffic volume has not translated into reduced revenues because there have been a number of general freight rate increases authorized by the Commission, which have offset the decline in volume. These general freight rate increases have resulted in a 42-percent increase in revenues between 1973 and 1977. This exceeded the increases for western class I railroads and U.S. class I railroads which totaled 40.3 percent and 36.2 percent, respectively. Similarly, the freight rate increases have caused Western Pacific's revenue per ton-mile to increase from 1.661 cents in 1973 to 2.579 cents in 1977. This 55-percent increase, was greater than the increases experienced by western class I railroads of 40 cents per ton-mile and all U.S. class I railroads of 41 cents per ton-mile.[32] It appears the gain in revenue per ton-mile was greater for Western Pacific than for other railroads because Western Pacific improved its product mix; it increased the percentage of higher rate traffic carried. However, if there are fewer or smaller freight rate increases in the future, and if Western Pacific's volume continues to decline, then the revenue loss will be reflected in the railroad's income statements.

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[29] See appendix F.

[30] The traffic density of Western Pacific is presented in appendix G. Western Pacific's density between Stockton, CA and Salt Lake City ranges from 6.2 to 7.8 million gross ton-miles per mile of road eastbound and 6.4 to 8.2 westbound.

[31] See appendix H.

Given the state of Western Pacific's financial position, we must now assess how well off its successor, Newrail, will be. It is our responsibility to consider whether Newrail will be at least as strong as Western Pacific. We must satisfy ourselves that nothing in the instant proposal will leave the successor in interest any more vulnerable to economic downturns or competitive setbacks.

At the outset we note that there is nothing in the record which would indicate that Newrail's railroad operations will be conducted any differently than Western Pacific's. Substantially all of the operating properties are being transferred. All 2,800 Western Pacific employees will be retained. Newrail will continue serving the same customers as before. While ownership will change, Newrail's management will remain substantially the same. We, therefore, expect no sudden changes in operating revenues which would be attributable to this transaction.

Nor do we expect any great changes in Newrail's operating expenses. (Depreciation will be discussed later.) Newrail's management team has demonstrated its ability to hold the line on operating expenses. This management team was successful in reducing Western Pacific's operating ratio from 96.5 percent in 1975 to 93.8 percent in 1977. These reductions occurred during the period when the aggregate operating ratio of all U.S. class I railroads deteriorated slightly from 96.4 percent in 1975 to 96.7 percent in 1977, and western class I railroads showed only a modest improvement from 94.1 percent in 1975 to 93.4 percent in 1977.[33] We anticipate that Newrail's management will put furth its best efforts to improve Newrail operationally so that it can bettter serve the public interest, improve its competitive position, and fortify itself against economic downturns.

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[32] See appendix H.

A review of Newrail's Consolidated *pro forma* financial statements reveals significant changes from those of its predecessor. In the first place, Newrail's cushion of excess capitalizable assets has substantially eroded away.[34] According to Newrail's *pro forma* balance sheet, prepared as of December 31, 1977, it would have total capitalizable assets of $82,806,000 consisting of $63,663,000 in net properties, $18,982,000 in working capital, and $161,000 in investments in affiliated companies.[35] It would have total capitalization of $78,874,000, consisting of current maturities of long-term debt, $5,589,000, long-term debt due after 1 year totaling $59,185,000, and capital stock in the amount of $14,100,000. Thus, according to the December 31, 1977 *pro forma* balance sheet, excess capitalizable assets would have shrunk to $3,932,000. This represents a decline of $102,497,000 from the excess capitalizable assets reported by Western Pacific on December 31, 1977. According to the *pro forma* balance sheet prepared as of June 30, 1978, Newrail claims some improvement. Had the transaction been consummated on that date, it projected $4,291,000 in excess capitalizable assets. Total capitalizable assets would have amounted to $80,564,000 consisting of $62,098,000 in net properties, $18,305,000 as working capital, and $161,000 in investments in affiliated companies.[36] Capitalization would have amounted to $76,273,000 consisting of $5,635,000 current maturities of long-term debt, $56,538,000 in long-term debt due after 1 year, and capital stock of $14,100,000.

Moreover, there has been a significant deterioration in the debt-equity ratio as between Western Pacific and Newrail. Whereas Western Pacific had a debt-equity ratio of 34 percent on December 31, 1977, Newrail would have had a debt-equity ratio of 82 percent, if the transaction had been consummated on December 31, 1977. On that date Newrail would have had total long-term debt of $64,774,000 and total shareholders equity of $14,100,000. Had the transaction been consummated on June 30, 1978, Newrail would have had a debt-equity ratio of 82 percent. Shareholders equity would remain at $14,100,00, but total long-term debt would have declined slightly to $62,173,000.

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[33] See appendix E.

[34] See appendix B.

[35] Working capital being current assets less current liabilities (excluding current maturities on capital leases and long-term debt).

[36] See footnote 35.

We are not disturbed by either the deterioration in the debt-equity ratio or the erosion of excess capitalizable assets in this case. These changes were brought about because of the application of the purchase method of accounting to the transaction. In this transaction, the historical book value of Western Pacific's assets is being reduced to reflect the lower purchase price Newrail is to pay. As shown on Newrail's *pro forma* balance sheet as of June 30, 1978, Western Pacific's net properties of $188,031,000 are to be written down by $125,933,000. The largest decline was in the road properties account. Similarly, there were reductions in the total shareholders equity account from $125,277,000 on the books of Western Pacific to $14,100,000 on the books of Newrail. The changes do not adversely affect the railroad's earning power. As previously stated there will be no changes in the way Newrail operates its railroad as compared with the way Western Pacific operates. All operating properties and all employees will go to Newrail. Only ownership will change. Moreover, Newrail will retain a cushion of excess capitalizable assets. Accordingly, the erosion of excess capitalizable assets should not be considered an unfavorable factor in evaluating the merits of the transaction. Similarly, the increased debt-equity ratio is not a problem here. There is no increase in liabilities associated with the transaction. On the contrary, Western Pacific's total long-term debt of $61,894,000 would increase slightly to $62,173,000 as of June 30, 1978, according to Newrail's *pro forma* balance sheet.[37] The change in the debt-equity ratio is brought about by the reduction in shareholders equity. By structuring this transaction as a purchase, shareholders equity was reduced to reflect what willing investors would pay for the ownership of Newrail. Newrail's shareholder equity will be a more realistic value and we favor this realistic approach. The applicants also state that they have assurances from the two leading bond rating services that the ratings of outstanding debt securities will not be affected by the proposed transaction. All this shows that the deterioration in the debt-equity ratio is not an unfavorable factor.

In some respects there will be improvements in the financial position of Newrail. On December 31, 1977, Western Pacific reported working capital of $15,919,000 ($50,035,000 current assets minus $34,116,000 current liabilities before current maturities and current portion of capital leases on long-term debt). Newrail's *pro forma* December 31, 1977 balance sheet projects working capital of $18,982,000 ($51,982,000 current assets less $33 million current liabilities before the current portion of capital leases and long-term debt). Finally, Newrail's June 30, 1978 *pro forma* balance sheet projected working capital of $18,305,000 ($54,587,000 less $36,282,000 current liabilities before current maturities on capital leases and long-term debt). While Western Pacific's current ratio was 1.47 on December 31, 1977, Newrail's *pro forma* December 31, 1977 statement shows it would improve to 1.58. Newrail's June 30, 1978 *pro forma* balance sheet shows the current ratio to be 1.50, still an improvement over Western Pacific's historical result. Additionally, Newrail would have sufficient working capital to maintain orderly operations for 61 days or 56 days, had the transaction been consummated on either December 31, 1977, or June 30, 1978, respectively, whereas Western Pacific had sufficient working capital to maintain orderly operations for 49 days on December 31, 1977 and for only 45 days on June 30, 1978.

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[37] See, also, appendix I.

The most significant effects of this transaction are seen in Newrail's *pro forma* statements of income for the year ended December 31, 1977 and for the 6 months ended June 30, 1978.[38] As we would expect, operating revenues remained the same, but net income decreased. The *pro forma* income statement for the year ended December 31, 1977 shows that Newrail's *pro forma* net income will decrease by $696,000 to $4,118,000. Similarly, the *pro forma* income statement for the 6 months ended June 30, 1978 shows net income falling by $338,000 to $3,141,000. The reasons for these declines stem from cumulative impact of writedown of Western Pacific's operating assets on Newrail's books. *Pro forma* operating income (operating revenues less operating expenses) increased because less depreciation could be taken on Newrail's assets. The increase in operating income was projected at $1,122,000 and $551,000 for 1977 and for the first half of 1978, respectively. There was also an increase in other income projected due to greater gains from the sale of Newrail's property. Despite the increases in projected revenue, net income was lower in each period because taxes increased and there are fewer investment tax credits available to Newrail. For 1977 Newrail projects that it will pay

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[38] See appendixes J and K, respectively.

$851,000 more in taxes but at the same time enjoy $727,000 less in investment tax credits.

While these significant reductions in income are of concern, we find that this will not substantially impair Newrail's ability to service its debt, make dividend payments or, in the long run, increase its working capital. This is because Newrail will pay out less in dividends than did Western Pacific. Newrail anticipates making annual dividend payments of approximately $1,199,000 which would provide its shareholders with approximately an 8 1/2-percent rate of return. The applicants contend that such a yield on the initial offering price is all that is needed for a successful public offering. The anticipated dividend is approximately $1,801,000 less than the dividends which were paid out in 1977 and would offset the reductions in net income. Given the dividend Newrail anticipates paying, Newrail's ability to service its debt, increase its working capital, as well as make dividend payments, can be seen from its *pro forma* consolidated statements of changes in financial position for 1977 and the first half of 1978.[39] The 1977 *pro forma* shows an unfavorable $1,737,000 decline in Newrail's sources of funds, attributable primarily to an $800,000 net reduction in depreciation and increased taxes. (The reduction in depreciation served to increase earnings, net income was lower due to reduced investment tax credits and higher taxes.) However, this $1,737,000 decrease in sources of funds was offset by a $1,879,000 decrease in the uses of Newrail's funds to give Newrail a modest $142,000 increase in working capital. Moreover, Newrail would have sufficient funds to reduce its long-term debt by $6,558,000 as well as deposit $16,059,000 with the trustee of Newrail's First and Refunding Mortgage Indenture.

For the first 6 months of 1978, Newrail's *pro forma* shows an unfavorable $643,000 decline in funds, but this was offset by a favorable $1,840,000 decrease in the uses of funds. Thus Newrail would have a net increase in its working capital of $1,197,000.

We are mindful that even with the decrease in dividends and the consequent net increase in working capital, Newrail's *pro forma* statement of changes in financial position for the first half of 1978 shows that it will have a net decrease in working capital of $142,000. This means that Newrail will be that much short in servicing the current portion of its debt or in making all anticipated dividend payments. However, Newrail has sufficient working capital, $18,305,000 according to its June 30, 1978 *pro forma* balance sheet, despite the decrease. Also, Newrail has shown us that the slight draw into working capital will reverse itself shortly. The reason is that the increased taxes Newrail anticipates in the first year after consummation will fall off later to the point where Newrail will have an increase in net income, a consequential increase in sources of funds and a parallel net increase in working capital. Appendix N shows applicants' estimates for increased net income of $107,000, $577,000, and $827,000 in 1978, 1979, and 1980, respectively. This is due in part to decreased income tax liability for Newrail in each year. (Newrail will obtain the benefit of additional investment credits in these years.) The progressively increasing income and limited dividends will serve to increase working capital by $722,000, $1,267,000, and $1,596,000 in 1978, 1979, and 1980, respectively.[40] These increases in working capital over the long run will enable Newrail to improve further its rail system.[41]

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[39] See appendixes L and M.

All factors considered, we are satisfied that Newrail will be financially fit to meet its common carrier obligations.

CONTROL BY MANAGEMENT

Five-year control.—Newrail's class B stock will be issued to seven key officers of Western Pacific.[42] For a period of 5 years these shareholders will elect a majority, five of Newrail's board of nine directors. The class B shareholders are to vote as a class. Of the 10,000 shares of class B stock to be issued, 5,001 shares will be offered to Robert G. Flannery, director, president, and chief executive officer of Newrail. Because cumulative voting is not allowed, Mr. Flannery, alone, will be able to elect five of Newrail's directors. He will have almost unfettered control of Newrail and its subsidiaries for the first 5 years. Upon consummation, each of Newrail's directors, as well as each officer holding positions with Industries, Western Pacific, or its subsidiaries will resign his position so that the buyers and sellers will have no officers and directors in common. Five years after the date of first issuance of the class A stock, all the directors will be elected by holders of the class A stock. Control of Newrail's key management will likely cease at that point. In the event of the president's death or incapacity during the initial 5 years, the stock restriction agreement pertaining to the class B stock provides that Newrail will repurchase the stock and the remaining class B shareholders shall purchase the remaining shares pro rata or the stock may be sold to the next president of Newrail. Therefore, Newrail will be continually controlled by its management team during the first 5 years of operation.

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[40] See appendix O.

[41] As of December 31, 1977, Western Pacific's deferred maintenance consisted of 34 miles of main line rail. The operating speed of this mileage has been reduced from the normal 60 miles per hour to 40 to 45 miles per hour. Appendix P reflects the average age and average economic service life of the system's track and equipment. Appendix Q shows the equipment owned and leased by Western Pacific as of December 31, 1977.

Approximately 84 percent of the Western Pacific system's main line trackage is heavyweight rail ranging from 100 to 136 pounds per yard. Of the 150 miles of first main line trackage owned, 493 miles are laid with welded rail. During the 5 years ended December 31, 1976, 13 percent of the crossties and 10 percent of the rail in main line track was replaced. The maintenance and betterments to the system's owned first main line are summarized in appendix R.

In 1977, the system laid 31 main line trackmiles of new rail, (all welded) and 0.4 main line miles of secondhand rail, installed 96,863 crossties, surfaced 335 miles of track and spot tamped an additional 910 miles, and ground 150 track miles of first main line using the Speno Rail Grinding Train.

[42] See footnotes, 4, 15, and 16.

We are satisfied that it would be in the public interest for Newrail's key management employees to control Newrail during its first 5 years of operation. None of the parties objects to this arrangement. Applicants argue that it is in the public interest to insure continuity of management between Western Pacific and Newrail. Such control will deter possible takeover of Newrail by another conglomerate or holding company. The arrangement will enable Newrail's management to devote its full energy to develop and improve Newrail without distractions from problems other than those connected with the railroad business. We recognized this goal to be a legitimate reason for vesting temporary control in management in the *North Western Employees* case, *supra* at 73. The plan will also insure Newrail's financial stability because the controlling trustees may declare realistic dividends which allow for the railroad's needs for working capital. We also find that control by Newrail's president is in the public interest. There is a valid business purpose for one individual to command this authority. In the *North Western Employees* case, we recognized that a railroad corporation must be operated as other corporations are operated; the corporation cannot be run on a town meeting basis. Mr. Flannery says that it would be inconsistent with his duties and responsibilities as president for subordinate officers to be able to challenge the president's authority.

While we approve of the control arrangement, the public interest requires us to impose a condition permitting the removal of any director for cause. The present plan contains no check on the power of the president and the other class B directors during the first 5 years. There is nothing to check excesses and no authority to judge adequacy of performance. Aside from their fiduciary duties, class B directors are insulated from the normal accountability and other controlling influences to which corporate management is ordinarily accountable.

We think the directors should be made responsible to some kind of reckoning during the period of their control. We also believe they should be removable for causes such as gross incompetence, conviction of a felony, and other acts of malfeasance which would make their continuance in the position of trust unreasonable and inconsistent with the public interest. Accordingly, our approval of the control arrangement will be subject to the condition that, during the 5 years that the class B stock is outstanding, upon petition by a State, a Newrail director, or the holders of at least 10 percent of Newrail's outstanding class A common stock, or upon its own initiative, the Commission may investigate whether there is good cause for removal of a Newrail director. If upon investigation the Commission finds that removal of the director is in the public interest, the Commission may direct termination of the directorship. See *North Western Employees, supra,* at 96.

In deciding to approve the control plan, we have considered whether the arrangement will adversely affect the price of Newrail's stock. The proposed control arrangement should not endanger the stock offering because the control is for a relatively short period of time, the price being determined by the stock market approach is competitive with other securities, and the removal condition insures that the class A shareholders will have some voice if the situation warrants.

Fitness of key officers.—While we approve of the control by management in principle, we must consider also whether the individuals who will exercise control are fit for the task. Our primary focus is on Mr. Flannery since he was formerly director of Western Pacific and had some say in dividend matters and Western Pacific's other policy decisions. We find Mr. Flannery fit to control Newrail. He acted responsibly as a director of Western Pacific. Mr. Flannery did not vote on the dividend declared and paid by Western Pacific in February 1978. Similarly, we find that the other officers of Western Pacific, who will own Newrail's class B stock, are fit to control Newrail.

In its verified statements, BIE questions whether the dividends paid by Western Pacific were excessive. The implication is that dividends were paid out of funds needed by the railroad to improve its operation. BIE points out that in 1976, 1977, and in the 6 months ending June 30, 1978, Western Pacific declared dividends of $2 million, $3 million, and $2.4 million, respectively, when it reported net income of $2 million, $4.8 million, and $3,479,000, respectively.[43]

In reply, Mr. Flannery says that the dividends paid in any 1 year do not necessarily correspond to the earnings of that year, but may represent earnings of a prior year and do not show that Western Pacific paid dividends in excess of earnings. He asserts that the dividends paid during the period from 1971-78 were 29 percent of the income earned. The dividends paid in 1977 and 1978, totaling $5.4 million, were approximately 50 percent of the earnings for 1976, 1977, and the first 6 months of 1978. The dividends paid in 1978 were in anticipation of Western Pacific's forgoing any further payment of dividends to Industries unless the purchase falls through. Mr. Flannery says that he abstained from the vote on the $2.4 million dividend payment on February 15, 1978, even though he supported it. He asserts that the dividend payments were reasonable even though they were paid at a time when some maintenance was being deferred. As of December 31, 1976, there existed $4.1 million of deferred maintenance, plant, and equipment, relating to 60.17 miles of slow orders. As of June 30, 1978, the deferred maintenance was reduced to approximately $2.7 million related to 27.08 miles of slow orders. Mr. Flannery says that deferred maintenance could have been reduced earlier but that dividend payments were important to maintain favorable credit and financing capabilities. He cautions that the public interest requires a reasonable return to shareholders. Otherwise, shareholders may have no incentive to purchase railroad securities.

Considering the ratio of dividends paid to Western Pacific's earnings and the small amount of deferred maintenance remaining as of June 30, 1978, we believe that the dividend policies of Western Pacific were not contrary to the public interest.

The American General Group has not filed verified statements. However, we have considered their previously raised allegations, particularly those which reflect on the fitness of the class B shareholders to control Newrail. We find no support for these allegations. The American General Group holds 25 percent of the Western Pacific Railroad Company First Mortgage 9 1/8-percent series B bonds, due 2002 (bonds). The bonds, in principal amount of $20 million, were issued by Western Pacific, pursuant to the

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[43] Western Pacific's consolidated income statements actually show net income of $1,975,000, $4,814,000, and $3,479,000 in 1976, 1977, and the first 6 months of 1978, respectively.

Commission's authorization in Finance Docket No. 28467, ***Western Pacific Railroad Company—Bonds*** (not printed), decided June 9, 1977. The American General Group suggests that misrepresentations were made by Western Pacific to the Commission in Finance Docket No. 28467 and in the prospectus offering the bonds for sale. The bondholders suggest that the dividends paid in 1977 and 1978 were financed by the bond issuance. If this were true, the officers of Western Pacific misrepresented to the Commission the use to be made of these funds and are not fit to control Newrail. The bondholders also suggest that the prospectus offering the bonds for sale should have informed the public of the impending sale to Newrail.

We find no merit in either of these contentions. In his verified statement, Mr. Stumbo, vice president of finance and treasurer of Western Pacific, says that the proceeds from the series B bonds were used to repay its first mortgage series A bonds, an expenditure of $16,059,375, and that the balance was used to finance capital equipment. Mr. Flannery states that he first had knowledge of the planned sale of Western Pacific on August 3, 1977, after the series B bonds has been issued. Mr. Stumbo learned of the plan at that time and Mr. Treanor learned of it 10 days later. In view of this, the prospective class B shareholders are not unfit to control Newrail.

Control of Newrail after expiration of class B stock.—The initial 5-year control of Newrail by the class B shareholders seems designed to preclude Newrail's control by a noncarrier holding company during that period. To avoid such a takeover after the initial 5-year period, BIE suggests that the Commission either (1) condition approval of this transaction upon prior approval of any future acquisition of Newrail and its subsidiaries by a noncarrier holding company, or (2) announce that it will no longer follow the jurisdictional policy on acquisitions of carrier systems by noncarrier holding companies, as set out in ***Louisville & J. B. & R. Co. Merger,*** 290 I.C.C. 725 (1955), 295 I.C.C. 11 (1955) (***Jeffersonville),*** affirmed ***sub nom. Alleghany Corp. et. al.*** v. ***Breswick & Co. et. al.,*** 353 U.S. 151 (1957). In *Jeffersonville,* we said that the Commission did not have jurisdiction under section 5(2) of the act over acquisition by a noncarrier of a single transportation system even if two or more regulated carriers were part of the system.

In reply, applicants object to using this case to announce a departure from policy set out in *Jeffersonville*. Applicants fear that their proposed transaction which does not directly involve *Jeffersonville*, could be delayed by extended litigation (perhaps by persons not now parties to the proceeding) because of the wide-ranging effects our change of policy may have. On the other hand, Newrail has no objection to the imposition of a condition which would prohibit a noncarrier holding company from acquiring control of Newrail and its subsidiaries without prior approval of the Commission.

We agree with applicants. This case is not the proper place for our reconsideration of the policies announced in *Jeffersonville*. Our reluctance to consider such a change here should not be interpreted as unwillingness to consider such change at a later time. We merely decline to give formal consideration to any such change at this time. We will, however, impose a condition designed to prevent takeover of Newrail by a noncarrier holding company without our prior approval. Our approval of the transaction shall be subject to the following condition:

> Neither Newrail nor any of its subsidiaries shall, without prior approval of this Commission, permit itself to become a subsidiary or affiliate of any company, incorporated or otherwise, principally engaged in other than transportation related operations. This Commission shall have the right, on its own motion or upon complaint, to investigate any acquisition of or affiliation with another company by Newrail or by a subsidiary of Newrail to determine whether such acquisition or affiliation is prohibited by this condition and if so, to require the termination of the acquisition or affiliation.

Restriction on dividends.—In order to insure that Newrail retains sufficient funds to strengthen the railroad's financial position, as applicants say they intend, we believe that we should restrict the amount of dividends Newrail will pay out during its first 5 years of operation. The board of directors of Newrail intends to consider payment of dividends on a quarterly basis. However, Newrail proposes to begin operation without retained earnings.

Applicants plan to issue each share of common stock, with a par value of $5 a share, at a price of $10 a share. Applicants contend that the $5 per share capital in excess of par value is available for distribution of dividends. We disagree. Section 11322 of the Code (section 20a(12) of the act) prohibits payment of dividends from funds included in a capital account. Payment of a dividend out of capital in excess of par value, we believe, would constitute a dividend payment out of a capital account, and as such, a return of capital to the shareholders.

We recognize that applicants have a problem, however, if they begin operations with no retained earnings and are not permitted to pay dividends out of capital in excess of par value. Newrail may, of course, accrue earnings from its operations within a few months of consummation. However, these earnings would not ordinarily be credited to a retained earnings account until the end of the calendar year. Thus, Newrail may be in the position of having *actual* earnings available for payment of dividends, but having no earnings in a retained earnings *account*. If applicants consummate the proposed transaction in early 1979, Newrail may have no earnings in a retained earnings account until the end of 1979. The possibility of a dividend payment might thus be delayed until sometime in 1980.

Because technical inability to pay dividends in the first year may jeopardize the public offering of Newrail's stock, we believe the situation warrants special consideration. We have found nothing in the legislative history of the former section 20a(12) of the act (now section 11322 of the Code), which elaborates on the congressional intent in prohibiting payment of dividends out of a capital account.[44] While Congress apparently intended to prohibit payment of dividends by carriers without accumulated earnings, we do not believe Congress intended to prevent payment of dividends when there are sufficient funds from earnings to justify payment of dividends to investors. Moreover, while we do not attempt to construe the statute here, we believe we are able to fashion some reasonable and practical relief because of the circumstances in this case. We will prohibit declaration and payment of dividends by Newrail in the first 90 days following consummation. Afterward, however, Newrail may declare and pay dividends out of current operating earnings, if any, subject to such further restrictions as we impose in this decision. We caution that our permitting such dividend payments is applicable only to the unique facts of this case. This should not be viewed as a change of policy on our part. Our action in this regard should not be considered as relieving Newrail of the requirements of any State law or of any limitations on the payment of dividends which are effective as a result of security agreements or other agreements between Western Pacific or Newrail and some other person or entity.

For the initial 5-year period generally, two proposed dividend restrictions are before us. BIE proposes that during the 5-year period, dividends in a calendar year be limited to 50 percent of the preceding calendar year's income.[45] Applicants propose that, during the first 2 years following consummation, annual dividends be limited to 9 percent of the aggregate offering price of Newrail's capital stock (i.e., a dividend limitation of approximately $1.26 million annually). Under applicants' proposal, during the next 3 years, aggregate dividends for any period (between consummation and the end of that period) could not exceed 50 percent of the aggregate consolidated net income of Newrail for the same period. Applicants would determine applicable figures in accordance with generally accepted accounting principles.[46]

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[44] H.R. Rep. No. 650, 66th Cong., 2d Sess. (1920); S.Rep. 304, 66th Cong., 1st Sess. (1919); H.R. Rep. No. 456, 66th Cong., 1st Sess. (1919).

[45] BIE's proposal is as follows:

> During the period in which Newrail's board of directors is separated into two classes, no dividends aggregating more than 50 percent of the preceding calendar year's income after contingent charges shall be declared or paid in the current calendar year on any class of stock.

We will impose a dividend restriction similar to that proposed by applicants. BIE's proposed condition would prevent Newrail from declaring or paying dividends during the first year after consummation of the transaction. As noted earlier, this may jeopardize the offering of Newrail stock, since investors may be unwilling to wait that long for some kind of return on their investments. Tying the maximum dividend sum allowable to prior calendar year's earnings also seems to limit directors' flexibility unnecessarily. Applicants' proposed restriction would permit investors a reasonable return for the initial 2-year period. In the subsequent 3 years in which the class B common shares remain outstanding, Newrail's board would be able to declare dividends based on the railroad's earnings from consummation to the time of declaration. Applicants' proposal allows Newrail's board of directors to follow a more cautious dividend payout policy. The board should be able to establish a more consistent dividend policy under this approach than it could if dividends were tied to the previous year's earnings.

While we generally approve of applicants' proposed dividend restriction, we believe two modifications are necessary. First, applicants' determination of net income and dividends in any period should be in accordance with the Commission's accounting regulations rather than with generally accepted accounting principles. This should add clarity and certainty to the computations and facilitate the necessary policing by the Commission to insure compliance with the condition. Second, dividends should be payable only out of operating income. We do not feel it would be consistent with the public interest for Newrail to pay dividends out of income which could be derived from sale of assets. The sale of assets whether rail or nonrail, to provide funds for dividend payments, may be detrimental to a new carrier like Newrail.

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[46] Applicants' specific proposal is as follows:

> During the first 2 years following the effective date (as defined in the purchase and sale agreement), dividends may be declared and paid by Newrail from its aggregate consolidated net income which do not exceed a return of 9 percent per year on the aggregate offering price of its capital stock. Thereafter, during the period in which Newrail's board of directors is separated into two classes, dividends may not be declared nor paid by Newrail if at such time the aggregate dividends declared (including those paid during the first 2 years following the effective date) would exceed 50 percent of the aggregate consolidated net income of Newrail for the portion of the calendar year following the effective date and for each calendar and partial year thereafter to the date of any dividend declaration, taken as one accounting period and determined in accordance with generally accepted accounting principles.

We will impose the following restrictive condition on dividends:

> During the first 2 years following the consummation of the transaction, dividends may be declared and paid by Newrail from its aggregate consolidated net operating income which do not exceed a return of 9 percent per year on the aggregate offering price of its capital stock, but no dividend shall be declared or paid in the first 90 days following consummation, and no dividend shall be paid out of capital in excess of par value. During the period in which Newrail's board of directors is separated into two classes, dividends may not be declared or paid by Newrail if at such time the aggregate dividends declared (including those paid during the first 2 years following consummation) would exceed 50 percent of the aggregate consolidated net operating income of Newrail for the portion of the calendar year following consummation and for each subsequent calendar year and partial year to the date of any dividend declaration, taken as one accounting period and determined in accordance with the Commission's accounting regulations.

LABOR PROTECTION

Applicants anticipate no effects on railroad employees because no operational changes are seen. Applicants are nevertheless agreeable to imposition of appropriate labor protective conditions. BLE, the only labor representative filing verified statements, suggests the same conditions as those imposed in *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271 (1952), (the *New Orleans* conditions), as supplemented by section 405 of the Rail Passenger Service Act (RPSA). In *North Western Employees, supra,* we imposed the *New Orleans* conditions, with slight modification. Section 5(2)(f) of the act (now section 11347 of the Code), as amended by the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), requires that the Commission, in approving transactions under section 5(2) of the act, impose protections for employees at least as beneficial as (1) those imposed prior to enactment of the 4R Act, and (2) those established pursuant to section 405 of RPSA. In *New York Dock Ry.—Control—Brooklyn Eastern Dist.,* 354 I.C.C. 399 (1978), the Commission, Division 3, found that the so-called appendix C-1 conditions developed pursuant to section 405 of RPSA, combined with provisions similar to sections 4 and 5 of the Washington Job Protection Agreement of 1936, provided appropriate protection in certain transactions under section 5(2) of the act where the *New Orleans* conditions were generally imposed prior to enactment of the 4R Act. We, therefore, believe that the conditions prescribed in *New York Dock, supra*, are appropriate in this transaction and satisfy the statute. We will impose the *New York Dock* conditions. Since that proceeding is presently pending administrative appeal, we shall reserve jurisdiction in this proceeding to reconsider labor protection in light of our ultimate decision in *New York Dock*.

TRAFFIC CONDITIONS

UP seeks imposition of appropriate conditions to preserve existing routes, gateways, and other traffic and operating relationships. UP has requested imposition of the type of routing and gateway conditions imposed in *North Western Employees, supra*, at 94-95. Applicants are amendable to these conditions, which are essentially the standard traffic conditions, first prescribed in *Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455, 492-93 (1950). We believe these conditions are sufficient to protect affected railroads. Our approval of this transaction will be subject to the traffic conditions set forth in *North Western Employees—Pur.—Chicago & N. W. Ry. Co.*, 342 I.C.C. 58, 94-95 (1972).

ENVIRIONMENTAL EFFECTS

Applicants anticipate no environmental impacts to result from this proposal. Since this transaction involves only a change in ownership of the Western Pacific system, there will apparently be no change in the operations or facilities of that system. We conclude, therefore, that the proposed transaction would not significantly affect the quality of the human environment. In view of the fact that no operational changes are foreseen as a result of this transaction, we conclude also that approval of the transaction will have no significant competitive impact on the railroad industry.

INTERLOCKING DIRECTORATES

In Finance Docket No. 28911, applicant Robert C. Marquis has the burden of showing that neither public nor private interests will suffer by his assuming the positions for which he seeks authority in his application. *In Re Astor*, 193 I.C.C. 528 (1933); *In Re Boatner*, 257 I.C.C. 369 (1944). In *Boyd Application Under Section 20a(12)*, 333 I.C.C. 815, 818 (1968), Division 3, Acting as an Appellate Division, stated "*** because of the possibility of conflict of interests, a person should not be permitted to serve as officer or director of more than one such railroad or system *except in special circumstances.*" [Emphasis added.]

In this case, applicants intend that the Newrail system will be managed by present managers within the Western Pacific system to provide continuity in operations by individuals familiar with the system. Given these intentions, interlocking directorates may be necessary at least temporarily to permit a smooth transaction in ownership of the rail assets. We believe specific circumstances exist here to permit Mr. Marquis to serve both systems until the proposed transaction is consummated. At consummation, or shortly afterward, Mr. Marquis (as well as Messrs. Flannery, Treanor, Stumbo, and Brew, who have previously been authorized to serve both "carrier" systems as officers or directors) should terminate all positions with Western Pacific, Tidewater, and Sacramento. Continuation of interlocking directorates beyond consummation would be neither necessary nor justified.

We reiterate that we are permitting interlocking directorates only as a means of effecting the purchase transaction proposed. Therefore, if applicants do not consummate the proposed transaction within 1 year from the effective date of this decision, our authorizations under section 11322 of the Code for Messrs. Flannery, Treanor, Stumbo, Brew, and Marquis to serve as officer or directors in the Newrail system as well as in the Western Pacific system will no longer be effective.

FINDINGS

In deciding these applications, we have considered all of the issues involved. Although some matters argued in the pleadings have not been specifically discussed, they have nevertheless been considered and found to be without merit. To the extent that those arguments include requests for relief not specifically granted in this decision, they are denied.[47]

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[47] Applicant Newrail, by letters dated December 6 and 18, 1978, requests expedited handling of these proceedings. The request is granted. It also asks that the Commission's decision be made effective immediately. Because this is the initial decision of the Commission, and because the other parties to the proceedings have not acquiesced in the request for an immediate effective date and may wish to exercise their right to file petitions for administrative review, the request is denied. We will, however, require that petitions for administrative review be filed within 15 days from the date of service of the decision.

We find that the proposed transactions meet the requirements of sections 10901, 11344, and 11301 of the Code (formerly sections 1(18), 5(2), and 20a of the act) and conform generally with the purposes and objectives of the national transportation policy declared by Congress.

The proposed transaction should replace noncarrier control of the transportation assets here involved with carrier management without affecting transportation service to the public. No other railroad has sought to be included in the transactions. Any increase in total fixed charges will not be inconsistent with the public interest and no guaranty or assumption of dividends or fixed charges is involved. Provision has been made for the protection of railroad employees who may be adversely affected.

In Finance Docket No. 28614 (Sub-No. 1), we find, subject to the conditions set forth in this decision, (1) that the public convenience and necessity requires, or will be enhanced by, the acquisition and operation by Newrail Company, Inc., Newsacno Co., Inc., and Newtide Co., Inc., of the existing lines of railroad of The Western Pacific Railroad Company and certain of its subsidiaries, as described in this decision, and (2) that (a) the purchase of selected assets of The Western Pacific Railroad Company and its selling subsidiaries, by Newrail Company, Inc., Newsacno Co., Inc., and Newtide Co., Inc., and the related acquisition by the buyers, of leases and contracts to operate properties of other carriers, and trackage rights over, and joint ownership in and use of, lines of other carriers and the involved terminals, now held by the sellers; (b) the control by Newrail Company, Inc., through stock ownership or otherwise of other carriers which the sellers may possess on the date of consummation of this transaction, including Western Pacific Transport Company, a motor carrier, and its operating rights, but not including Sacramento Northern Railway or Tidewater Southern Railway Company; and (c) control over the Newrail system by Robert G. Flannery, John J. Gray, Robert C. Marquis, Roger G. Meldahl, Richard W. Stumbo, Jr., Walter G. Treanor, and Alexis P. Victors, as holders of the class B common stock of Newrail, for a period not to exceed 5 years from the date of consummation of the transaction, all upon the terms and conditions set forth in this decision and in the agreements of record, are just and reasonable and are transactions within the scope of section 11343 of the Code (section 5(2)(a) of the act) and will be consistent with the public interest.

In Finance Docket No. 28614 (Sub-No. 2), we find that, under the proposed terms and conditions, (1) the issuance by Newrail Company, Inc., of not exceeding 1,565,555 shares of class A common stock of $5 per share par value and not exceeding 10,000 shares of class B common stock of $5 per share par value; (2) the issuance by Newsacno Co., Inc., of not exceeding 10,000 shares of common stock of $10 per share stated value; (3) the issuance by Newtide Co., Inc., of not exceeding 10,000 shares of common stock of $10 per share stated value; (4) the assumption by Newrail Company, Inc., and its subsidiaries, of the obligations and liabilities in respect of securities issued, assumed, or guaranteed by the sellers; (5) the entering into a second supplemental indenture by Newrail Company, Inc., with Crocker National Bank, trustee, relating to the first and refunding mortgage of The Western Pacific Railroad Company; and (6) the entering into a second supplemental indenture by Newrail Company, Inc., with Bank of America National Trust and Savings Association, trustee, relating to income debentures of The Western Pacific Railroad Company all (a) are for a lawful object within the corporate purposes of Newrail Company, Inc., Newsacno Co., Inc., and Newtide Co., Inc., are compatible with the public interest, are necessary and appropriate for and consistent with the proper performance by Newrail Company, Inc., Newsacno Co., Inc., and Newtide Co., Inc., of service to the public as common carriers, and will not impair their abilities to perform that service; and (b) are reasonably necessary and appropriate for such purposes.

In Finance Docket No. 28911, we find that applicant Robert C. Marquis has shown that neither public nor private interests will be adversely affected by his assumption of the positions sought in this application.

We find that this decision is not a major Federal action significantly affecting the quality of the human environment.

It is ordered:

1. In Finance Docket No. 28614 (Sub-No. 1), subject to the terms and conditions discussed above, (a) the purchase of certain assets, and operation of the lines of railroad, of The Western Pacific Railroad Company, Sacramento Northern Railway, and Tidewater Southern Railway Company, by Newrail Company, Inc., Newsacno Co., Inc., and Newtide Co., Inc., and the related acquisition by Newrail Company, Inc., Newsacno Co., Inc., and Newtide Co., Inc., of leases and contracts to operate properties of other carriers, and trackage rights over, and joint ownership in and use of, lines and

involved terminals of other carriers, now held by The Western Pacific Railroad Company, Sacramento Northern Railway, and Tidewater Southern Railway Company; (b) the control by Newrail Company, Inc., through stock ownership or otherwise, of (i) other carriers, other than Sacramento Northern Railway and Tidewater Southern Railway Company, controlled by The Western Pacific Railroad Company on the date of consummation of the transaction, including Western Pacific Transport Company, a motor carrier, and (ii) Newsacno Co., Inc., and Newtide Co., Inc.; and (c) the control by Robert G. Flannery, John J. Gray, Robert C. Marquis, Roger G. Meldahl, Richard W. Stumbo, Jr., Walter G. Treanor, and Alexis P. Victors of Newrail Company, Inc., and in turn of Newsacno Co., Inc., and Newtide Co., Inc., for a period not to exceed 5 years from the date of consummation of this transaction, are approved and authorized.

2. In Finance Docket No. 28614 (Sub-No. 2), (a) the issuance by Newrail Company, Inc., of not exceeding 1,565,555 shares of class A common stock and not exceeding 10,000 shares by class B common stock; (b) the issuance by Newsacno Co., Inc., and Newtide Co., Inc. of not exceeding 10,000 shares of common stock each; (c) the assumption by Newrail Company, Inc., Newsacno Co., Inc., and Newtide Co., Inc., of the obligations and liabilities in respect of securities issued, assumed, or guaranteed by The Western Pacific Railroad Company, Sacramento Northern Railway, and Tidewater Southern Railway Company; and (d) the entering into a second supplemental indenture by Newrail Company, Inc., with (i) Crocker National Bank, trustee, relating to the first and refunding mortgage of The Western Pacific Railroad Company, and (ii) Bank of America National Trust and Savings Association, trustee, relating to income debentures of The Western Pacific Railroad Company, are approved and authorized.

3. In Finance Docket No. 28911, the applications of Robert C. Marquis for authority to hold the positions of director and vice president-operation of Newrail Company, Inc., Newsacno Co., Inc., and Newtide Co., Inc., while holding the positions with present carriers as stated previously in this decision, is granted.

4. If the authority granted by this decision is exercised, Newrail Company, Inc., shall, within 60 days, submit three copies of a sworn statement showing all journal entries required to record the transaction. The statement shall include the related accounting information as set forth previously in this decision.

5. Except as set forth in this decision, the stock authorized for issuance shall not be sold, pledged, or otherwise disposed of by Newrail Company, Inc., Newsacno Co., Inc., and Newtide Co., Inc., unless or until so ordered or approved by this Commission.

6. Except as authorized in this decision, applicants shall assume no obligations or liabilities, unless or until so ordered or approved by this Commission.

7. Applicants shall report concerning the matters involved in this decision in conformity with the requirements of section 1115.6 of Title 49 of the Code of Federal Regulations.

8. Jurisdiction is expressly reserved to receive such petitions, institute such investigations, and issue such decisions as necessary to accomplish the objectives and purposes of the conditions prescribed in this decision. This reservation of jurisdiction is in addition to those decisions which may be issued under the provisions of sections 11701 and 11301(d)(1) of Title 49, Subtitle IV of the United States Code (formerly sections 5(10) and 20a(3) of the act) as deemed necessary or appropriate to supplement this decision.

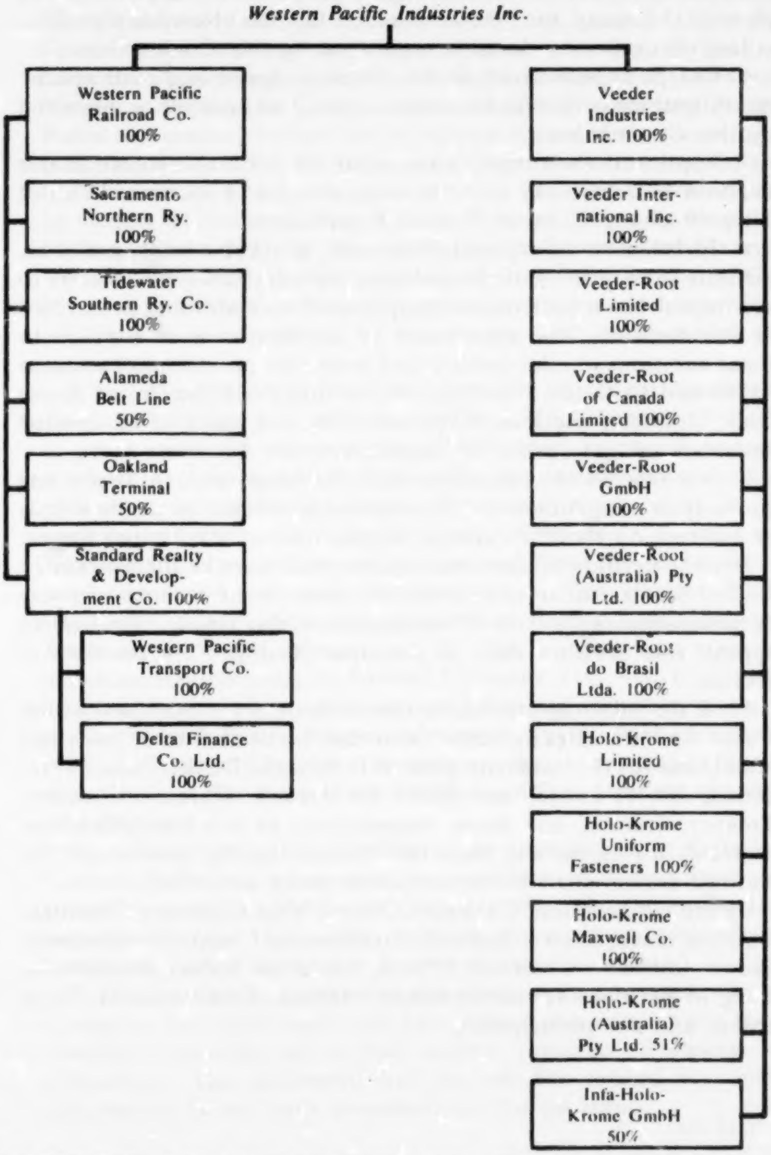
9. Nothing in this decision shall be construed to imply any guaranty or obligation as to the involved securities, or the dividends or interest on those securities, on the part of the United States.

10. Any petition for administrative review must be filed within 15 days of the date of service of this decision. In the absence of a stay or postponement by the Commission or the timely filing of an appeal, this decision shall be effective 30 days from the date of service.

11. If the authority granted by this decision is not exercised within 1 year from the effective date, (a) it shall be of no further force and effect, and (b) the authority granted in Finance Docket Nos. 28911, 28613, 28617, 28618, and 28619 for Messrs. Marquis, Flannery, Treanor, Stumbo, and Brew, respectively, to serve as officers or directors for carriers in both the Western Pacific system and the Newrail system shall be of no further force and effect.

By the Commission. Chairman O'Neal, Vice Chairman Christian, Commissioners Brown, Stafford, Gresham and Clapp. Commissioner Brown, joined by Chairman O'Neal, would not reduce the time for filing of petitions for administrative review. Commissioner Clapp absent and not participating.

APPENDIX A


Western Pacific Industries Inc.
Western Pacific Railroad Co. 100%
Sacramento Northern Ry. 100%
Tidewater Southern Ry. Co. 100%
Alameda Belt Line 50%
Oakland Terminal 50%
Standard Realty & Development Co. 100%
Western Pacific Transport Co. 100%
Delta Finance Co. Ltd. 100%
Veeder Industries Inc. 100%
Veeder International Inc. 100%
Veeder-Root Limited 100%
Veeder-Root of Canada Limited 100%
Veeder-Root GmbH 100%
Veeder-Root (Australia) Pty Ltd. 100%
Veeder-Root do Brasil Ltda. 100%
Holo-Krome Limited 100%
Holo-Krome Uniform Fasteners 100%
Holo-Krome Maxwell Co. 100%
Holo-Krome (Australia) Pty Ltd. 51%
Infa-Holo-Krome GmbH 50%

Note: Western Pacific Railroad Co. has minority interest in several transportation related companies.

APPENDIX B

Newrail Co., Inc. pro forma consolidated balance sheet as of December 31, 1977

	Western Pacific consolidated	Adjustments		Western Pacific adjusted consolidated	Basis adjustments		Value for basis of allocation	Pro forma adjustments		Newrail consolidated fair market value
		Debit	Credit		Debit	Credit		Debit	Credit	
					Thousands					
Assets										
Current:										
Cash and temporary cash investments	$19,387	$1,434		$20,821			$20,821			$20,821
Accounts receivable	24,121	871		24,992			24,992			24,992
Materials and supplies	4,958		$479	4,479			4,479			4,479
Materials and supplies slow moving		530		530			530		$409	121
Prepaid expenses	1,569			1,569			1,569			1,569
Total current assets	50,035	2,835	479	52,391			52,391		409	51,982
Notes receivable and other investments:										
Notes and contracts receivable	1,026			1,026		$82	944		797	147
Investments in affiliated companies	3,242			3,242		2,540	702		541	161
Trustee, insurance other special funds	1,031			1,031			1,031			1,031
Earmarked funds	32			32			32			32
	5,331			5,331		2,622	2,709		1,338	1,371

Newrail Co., Inc. pro forma consolidated balance sheet as of December 31, 1977—Continued

	Western Pacific consolidated	Adjustments		Western Pacific adjusted consolidated	Basis adjustments		Value for basis of allocation	Pro forma adjustments		Newrail consolidated fair market value
		Debit	Credit		Debit	Credit		Debit	Credit	
					Thousands					
Properties:										
Transportation	$233,293	$2,117		$235,410		$165,979	$69,431		$31,510	$37,921
Miscellaneous	18,329		$1,287	17,042	$18,397		35,439		27,872	7,567
Gross properties	251,622	2,117	1,287	252,452	18,397	165,979	104,870		59,382	45,488
Accumulated depreciation and amortization	(79,366)			(79,366)	79,366					
Capital leases	16,209			16,209	1,966		18,175			18,175
Net properties	188,465	2,117	1,287	189,295	99,729	165,979	123,045		59,382	63,663
Deferred charges and other assets	2,921		2,103	818		818				
Total assets	246,752	4,952	3,869	247,835	99,729	169,419	178,145		61,129	117,016
Liabilities										
Current:										
Current portion—capital leases	2,149			2,149	118		2,031			2,031
Accounts payable and accruals	28,570	148		28,422	127		28,295			28,295
Accrued payroll and vacation pay	4,705			4,705			4,705			4,705
Income taxes payable	841	110		731	731					
Current portion of long-term debt	3,558			3,558			3,558			3,558
Total current liabilities	39,823	258		39,565	976		38,589			38,589

Newrail Co., Inc. pro forma consolidated balance sheet as of December 31, 1977—Continuedded

	Western Pacific consolidated	Adjustments		Western Pacific adjusted consolidated	Basis adjustments		Value for basis of allocation	Pro forma adjustments		Newrail consolidated fair market value
		Debit	Credit		Debit	Credit		Debit	Credit	
					Thousands					
Long-term:										
Capital leases	$16,950			$16,950	$766		$16,184			$16,184
Long-term debt due after 1 year	41,838		$1,859	43,697	696		43,001			43,001
Casualty and other liabilities	5,015	$518		4,497	146		4,351			4,351
Pension liability						$891	891			891
Total long-term liabilities	63,803	518	1,859	65,144	1,608	891	64,427			64,427
Deferred Federal income taxes	18,928			18,928	18,928					
Shareholders' equity:										
Common stock	36,211			36,211	36,211	14,000	14,000			14,000
Capital in excess of par value	5,785			5,785	5,785					
Retained earnings	82,202			82,202						
Pro forma adjustment					21,073		61,129	$61,129		
Total shareholders' equity	124,198			124,198	63,069	14,000	75,129	61,129		14,000
Total liabilities & shareholders' equity	246,752	776	1,859	247,835	84,581	14,891	178,145	61,129		117,016

APPENDIX C

Pro forma condensed consolidated balance sheet of Newrail (unaudited)

	June 30, 1978 (unaudited)			
	WPRR historical	Pro forma adjustments		Newrail pro forma
		Debit	Credit	
	Thousands			
Assets				
Current:				
Cash and cash equivalents	$17,737	[11]$1,959	------------	$19,696
Other current assets	34,135	[2]756	------------	34,891
Total current assets	51,872	2,715	------------	54,587
Properties:				
Road	146,494	------------	$[2]144,868	1,626
Transportation equipment and improvements on leased property	117,102	------------	[4]64,396	52,706
Nonoperating property	18,528	------------	[2]10,762	7,766
	282,124	------------	220,026	62,098
Accumulated depreciation and amortization	(94,093)	[4]94,093	------------	------------
Net properties	188,031	94,093	220,026	62,098
Other assets	7,777	------------	[2]5,884	1,893
Total assets	247,680	96,808	225,910	118,578
Liabilities and stockholders' equity				
Total current liabilities	42,999	[2]1,082	------------	41,917
Long-term debt and capital leases due after 1 year	56,141	[2]1,462	[1]1,859	56,538
Casualty and other liabilities	4,427	------------	[2]1,596	6,023
Deferred income taxes	18,836	[2]18,836	------------	------------
Commitments and contingent liabilities stockholders' equity:				
Common stock	36,211	[2]36,211	[11]7,050	7,050
Capital surplus	5,785	[2]5,785	------------	------------
Capital in excess of par value	------------	------------	[11]7,050	7,050
Retained earnings	83,281	[4]83,281	------------	------------
Total stockholders' equity	125,277	125,277	14,100	14,100
Total liabilities and stockholders' equity	247,680	146,657	17,555	118,578

See footnotes on following page.

[1] Issuance of new debt prior to consummation of the transaction.

[2] Generally accepted accounting principles require that the assets acquired and liabilities assumed by Newrail be valued under the purchase method of accounting. Under this method, assets acquired are recorded at cost equal to the sum of the cash portion of the purchase price ($14 million) and the liabilities assumed ($104,478,000 at June 30, 1978). The liabilities assumed are valued at the present value of amounts to be paid determined at appropriate current interest rates, considering income tax effects, and include the accrual of certain pension and other liabilities. This caused, at June 30, 1978, Newrail's *pro forma* book value of the liabilities assumed to be $104,478,000 instead of WPRR's historical basis of $102,720,000. The sum of the cash portion of the purchase price and the liabilities assumed ($118,478,000 at June 30, 1978) was allocated to each of the assets acquired based on the provisions of the purchase agreement. The application of the purchase method of accounting results in a significant reduction from the value of the long-term assets acquired, principally properties, reflected on the consolidated balance sheet of WPRR since the purchase price is substantially less than their net book value. (See note 2 to Consolidated Financial Statements of WPRR.)

[3] Issuance by the company of 1,400,000 shares of class A common stock for $10 per share.

[4] Issuance by the company of 10,000 shares of class B common stock for $10 per share.

APPENDIX D

The Western Pacific Railroad Company consolidated statement of income

	Year ended December 31					Six months ended June 30	
	1973[1]	1974[1]	1975[1]	1976[1]	1977	1977[1]	1978
				Thousands		*Unaudited*	
Railroad operating revenues							
Freight	$88,117	$103,540	$98,549	$109,306	$124,993	$58,210	$66,669
Other	1,461	3,864	4,383	1,798	2,244	1,049	968
Total	$89,578	107,404	102,932	111,104	127,237	59,259	67,637
Railroad operating expenses[2]							
Way and structures	13,182	15,477	15,436	16,604	18,280	8,295	9,639
Equipment	19,430	24,120	23,331	24,171	28,199	12,805	14,806
Transportation	37,710	45,834	45,731	49,232	55,352	26,575	28,814
General and administrative	13,078	15,945	14,841	15,773	17,459	8,411	9,282
Total	83,400	101,376	99,339	105,780	119,290	56,086	62,541
Income from operations	6,178	6,028	3,593	5,324	7,947	3,173	5,096
Other income—net	1,354	2,311	2,392	779	1,536	287	1,101
Interest expense	4,147	3,809	4,148	4,192	4,693	2,026	2,564
Income before income taxes and extraordinary item	3,385	4,530	1,837	1,911	4,790	1,434	3,633
Income taxes	1,200	1,390	741	(64)	(24)	(70)	154
Income before extraordinary item	2,185	3,140	1,096	1,975	4,814	1,504	3,479

See footnotes at end of chart.

The Western Pacific Railroad Company consolidated statement of income—Continued

	Year ended December 31					Six months ended June 30	
	1973[1]	1974[1]	1975[1]	1976[1]	1977	1977[1]	1978
				Thousands		*Unaudited*	
Extraordinary item	$930	----------	----------	----------	----------	----------	----------
Net income	3,115	$3,140	$1,096	$1,975	$4,814	$1,504	$3,479
Dividends	----------	----------	1,000	2,000	3,000	1,000	2,400
Railroad expense ratio---------percent	93.1	94.4	96.5	95.2	93.8	94.6	92.5

[1] Restated to reflect capitalization of leases under Financial Accounting Standards Board Statement No. 13. 6-Month period ended June 30, 1977 also restated to eliminate equalization of Way and Structures Expense.

[2] Restated to the new Interstate Commerce Commission Uniform System of Accounts effective January 1, 1978, to reallocate categories of railroad operating expenses.

APPENDIX E

Operating ratios[1] U.S. class I railroads[2]

	Operating revenues	Operating expenses	Operating ratio
	Millions	*Millions*	*Percent*
1977	$19,704	$19,058	96.7
1976	18,188	17,423	95.8
1975	16,038	15,455	96.4
	Western Class I Railroads		
1977	9,840	9,190	93.4
1976	8,914	8,309	93.2
1975	7,832	7,367	94.1
	Western Pacific Railroad Company		
	Thousands	*Thousands*	
1977	127,237	119,290	93.8
1976	111,104	105,780	95.2
1975	102,932	99,339	96.5

[1] Operating expenses divided by operating revenues with operating expenses restated to reflect the new Commission Uniform System of Accounts effective January 1, 1978.

[2] Excluding Amtrak and Auto-Train.

APPENDIX F

Freight revenues by commodities

	Percent of revenue				
	1973	1974	1975	1976	1977
Food and kindred products (processed food)	28.9	29.5	32.5	32.1	29.2
Transportation equipment	10.9	13.5	10.3	9.2	13.6
Primary metal products	6.8	6.7	6.6	6.8	6.4
Lumber and wood products (excluding furniture)	8.3	6.3	5.9	6.6	6.5
Chemical and allied products	4.8	5.5	6.4	5.7	5.6
Ordnance and accessories	3.7	1.9	0.8	0.4	0.3
Pulp, paper and allied products	5.8	5.8	6.3	6.2	5.7
Farm products	5.1	4.3	3.8	3.7	2.4
Nonmetallic minerals (excluding fuels)	2.6	3.3	3.8	3.8	4.1
Stone, clay or glass products	3.1	2.9	2.7	2.4	2.3
Petroleum or coal products	2.3	2.5	3.0	2.7	2.6
Miscellaneous mixed shipments	3.4	3.7	5.4	6.7	7.2
All other (none exceeding 3 percent in any of the 5 years)	14.3	14.1	12.5	13.7	14.1
	100.0	100.0	100.0	100.0	100.0

APPENDIX G

Western Pacific Railroad Co. traffic density

Line Segment	Millions of gross ton-miles per mile of road	
	Eastbound	Westbound
Oakland-Stockton	3.5	3.8
Stockton-Sacramento-Maryville-Oroville-Keddie-Portola	7.8	8.2
Portola, CA-Flanigan, NV	6.2	6.5
Flanigan-Weso[1]	6.2	6.5
Weso-Alazon[2]	6.6	6.6
Alazon, NV-Wendover, CO	6.6	6.4
Wendover, CO-Salt Lake City, UT[3]	6.8	6.6
Keddie, CA-Bieber, CA	3.1	3.3

[1] WP and SP operate jointly on this track in both directions. SP density was 4.2 MGT eastbound and 2.0 MGT westbound.

[2] On paired track between Weso and Alazon, WP and SP operate on WP tracks for eastbound traffic and SP tracks for westbound traffic. SP density was 20.9 MGT eastbound and 19.2 MGT westbound.

[3] Between Garfield and Salt Lake City, UP and WP operate joint track. UP density was 7.5 MGT eastbound and 11.2 MGT westbound.

APPENDIX H

Selected operating statistics

	Revenue ton-miles		
	U.S. class I railroads[1]	Western class I railroads	Western Pacific Railroad Company
		Millions	
1977	$826,202	$454,145	$4,967
1976	794,059	426,395	4,888
1975	754,252	396,083	4,782
1974	850,961	441,895	5,637
1973	851,809	448,907	5,496
Percent change 1973 to 1977	-3.0	+1.2	-9.6
		Railroad operating revenues	
1977	$20,116	$9,918	$127.2
1976	18,536	8,979	111.1
1975	16,402	7,866	102.9
1974	16,923	8,060	107.4
1973	14,770	7,071	89.6
Percent change 1973 to 1977	+36.2	+40.3	+42.0
		Revenues per ton-mile	
		Cents	
1977	2.290	2.110	2.579
1976	2.291	2.033	2.290
1975	2.041	1.913	2.101
1974	1.853	1.743	1.900
1973	1.617	1.504	1.661
Percent change 1973 to 1977	+41.6	+40.3	+55.3

[1] Excluding Amtrak and Auto-Train.

APPENDIX I

Capitalization

The following table sets forth the consolidated capitalization (unaudited) of WPR at June 30, 1978 and the *pro forma* consolidated capitalization of Newrail at June 30, 1978, after giving effect to the proposed acquisition of the assets and business of WPR and its subsidiaries and issuance of class A and B common stock.

		Pro forma adjustments		
	WPR historical	Debit	Credit	Newrail pro forma
		Thousands		
Short-term debt:				
Equipment obligations due within 1 year	$3,420	-----	-----	$3,420
Capital lease obligations due within 1 year	2,149	$118	-----	2,031
Other obligatons due within 1 year	184	-----	-----	184
Total short-term debt	5,753	118	-----	5,635
Long-term debt:				
First and refunding mortgage bonds, series A principal amount	14,275	-----	-----	14,275
Funds deposited with trustee for payment at maturity (1981)	(14,275)	-----	-----	(14,275)
First mortgage bonds, series B, due 2002 ($20 million outstanding)	19,902	600	-----	19,302
Income debentures, due 1984	5,072	269	-----	4,803
Euipment obligations, due 1979-1993	14,214	-----	$173	14,387
Capital lease obligations, due 1979-1988	15,886	766	-----	15,120
Other obligations, due 1979-1988	1,067	-----	1,859	2,926
Total long-term debt	56,141	1,635	2,032	56,538
Stockholders' equity:				
Preferred stock of WPR—authorized 750,000 shares, $100 par value per share; none outstanding.	-----	------	-----	-----
Preferred stock of the company—authorized 1 million shares, $5 par value; none outstanding.	-----	-----	-----	-----
Common stock of WPR—authorized 3 million shares, without par value; 1,917,112 shares outstanding	36,211	36,211	-----	-----
Class A common stock of the company—authorized 3,900,000 shares, $5 par value; 1,400,000 shares outstanding (c)	-----	-----	7,000	7,000
Class B common stock of the company—authorized 100,000 shares, $5 par value; 10,000 shares outstanding	-----	-----	50	50
Capital surplus	5,785	5,785	-----	-----
Capital in excess of par value	-----	-----	7,050	7,050
Retained earnings	83,281	83,281	-----	-----
Total stockholders' equity	125,277	125,277	14,100	14,100
Total capitalization	187,171	127,030	16,132	76,273

APPENDIX J

Pro forma consolidated statment of income of Newrail (unaudited) year ended December 31, 1977

	WPRR historical	Pro forma adjustments Debit/(Credit)	Newrail pro forma
		(000)	
Operating revenues	$127,237	----------	$127,237
Operating expenses	119,290	$(853)	118,168
	----------	(269)	----------
Operating income	7,947	(1,122)	9,069
Other income—net	1,536	86	1,450
Interest expense	4,693	154	4,847
Income before income taxes	4,790	(882)	5,672
Income taxes	1,978	851	2,829
Less: Investment tax credit	(2,002)	727	(1,275)
Net income taxes	(24)	1,578	1,554
Net income	4,814	696	4,118

APPENDIX K

Pro forma consolidated statements of income of Newrail

	Six months ended June 30, 1977 (unaudited)			Six months ended June 30, 1978 (unaudited)		
	WPR historical	Pro forma adjustments Debit/(Credit)	Newrail pro forma	WPR historical	Pro forma adjustments Debit/(Credit)	Newrail pro forma
			Thousands			
Operating revenues	$59,259	-----	$59,259	$67,637	-----	$67,637
Operating expenses	56,086	$(425)	55,526	62,541	$(416)	61,990
	-----	(135)	-----	-----	(135)	-----
Operating income	3,173	(560)	3,733	5,096	(551)	5,647
Other income—net	287	(63)	350	1,101	(68)	1,169
Interest expense	2,026	66	2,092	2,564	77	2,641
Income before income taxes	1,434	(557)	1,991	3,633	(542)	4,175
Income taxes	580	449	1,029	1,693	446	2,139
Less: Investment tax credit	(650)	167	(483)	(1,539)	434	(1,105)
Net income taxes	(70)	616	546	154	880	1,034
Net income	1,504	59	1,445	3,479	338	3,141

APPENDIX L

Pro forma consolidated statements of changes in financial position of Newrail

	Year ended December 31, 1977 (unaudited)		
	WPRR historical	Pro forma adjustments	Newrail pro forma
		Thousands	
Source of funds:			
Net income	$4,814	$(696)	$4,118
Add charges (deduct credits) to income not requiring the outlay or receipt of working capital in the current period:			
Depreciation	7,630	(800)	6,830
Gain on sale of property and other items	(820)	(78)	(898)
Provision for income tax not currently payable	(385)	(163)	(548)
Working capital provided from operations	11,239	(1,737)	9,502
Proceeds from sale of properties	1,832	--------	1,832
Increase in long-term debt	22,131	--------	22,131
Total	35,202	(1,737)	33,465
Applications of funds:			
Decrease in long-term debt	6,636	78	6,558
Deposits with trustee for retirement of debt plus interest at maturity	16,059	--------	16,059
Additions to properties	7,297	--------	7,297
Decrease in earmarked funds	(4,911)	--------	(4,911)
Dividends	3,000	1,801	1,199
Miscellaneous	581	--------	581
Total	28,662	1,879	26,783
Increase in working capital	6,540	142	6,682

APPENDIX M

Pro forma consolidated statements of changes in financial position of Newrail

	Six months ended June 30, 1977 (unaudited)			Six months ended June 30, 1978 (unaudited)		
	WPRR historical	Pro forma adjustments	Newrail pro forma	WPRR historical	Pro forma adjustments	Newrail pro forma
			Thousands			
Source of funds:						
Net income	$1,504	$(59)	$1,445	$3,479	$(338)	$3,141
Add charges (deduct credits) to income not requiring the outlay or receipt of working capital in the current period:						
Depreciation	3,788	(400)	3,388	3,736	(391)	3,345
Gain on sale of property and other items	(194)	(155)	(349)	(1,081)	(149)	(1,230)
Provision for income tax not currently payable	(178)	18	(160)	(92)	235	143
Working capital provided from operations	4,920	(596)	4,324	6,042	(643)	5,399
Proceeds from sale of properties	354	--------	354	1,835	--------	1,835
Increase in long-term debt	20,098	--------	20,098	1,249	--------	1,249
Total	25,372	(596)	24,776	9,126	(643)	8,483
Application of funds:						
Decrease in long-term debt	4,071	39	4,032	3,736	39	3,697
Deposits with trustee for retirement of debt plus interest at maturity	16,059	--------	16,059	--------	--------	--------
Additions to properties	2,371	--------	2,371	4,030	--------	4,030
Increase (decrease) in earmarked funds	(4,187)	--------	(4,187)	29	--------	29

Pro forma consolidated statements of changes in financial position of Newrail—Continued

	Six months ended June 30, 1977 (unaudited)			Six months ended June 30, 1978 (unaudited)		
	WPRR historical	Pro forma adjustments	Newrail pro forma	WPRR historical	Pro forma adjustments	Newrail pro forma
			Thousands			
Application of funds—Continued:						
Dividends	$1,000	$401	$599	$2,400	$1,801	$599
Miscellaneous	279		279	270		270
Total	19,593	440	19,153	10,465	1,840	8,625
Increase (decrease) in working capital	5,779	(156)	5,623	(1,339)	1,197	(142)

APPENDIX N

Newrail pro forma adjustments of consolidated statement of income compared with the Western Pacific Railroad Company

	Years		
	1978	1979	1980
		Thousands	
Railway operating expenses:			
Maintenance of equipment	$474	$475	$474
Maintenance of roadway and structures	[1](1,247)	[1](1,243)	[1](1,243)
Other	[2](29)	[2](29)	[2](29)
Total pro forma adjustments to railway operating expenses	(802)	(797)	(798)
Net railway operating income	802	797	798
Other income-net	[3]392	[3]381	[3]343
Total pro forma adjustments to income available for fixed charges	1,194	1,178	1,141
Interest expense	[4]154	[4]155	[4]146
Total pro forma adjustments to income before income taxes	1,040	1,023	995
Income taxes:			
Current	1,099	544	225
Deferred	(166)	(108)	(57)
Total pro forma adjustments to income taxes	933	446	168
Total pro forma adjustments to net income	107	577	827

Increase (decrease).

Footnotes 1, 2, 3, and 4 do not involve a change in cash expenditures.

[1] Decrease in maintenance of roadway and structures results solely from decreased depreciation due to writing down the assets.

[2] Amortization of the unfunded vested pension liability.

[3] Increase in other income results from greater gain on sale of property because of writing down of assets.

[4] Increase in interest expense is due to writedown of long term debt to reflect today's higher interest costs.

APPENDIX O

Newrail pro forma adjustments of consolidated statement of changes in financial position compared with the Western Pacific Railroad Company

	1978	1979	1980
		Thousands	
Source of funds:			
Net income	[1]$107	[1]$577	[1]$827
Add charges (deduct credits) to income not requiring the outlay of working capital in the current period:			
Depreciation	(762)	(757)	(758)
Gain on sale of property and other items	(336)	(325)	(295)
Provision for Federal income tax not currently payable	(166)	(108)	(57)
Total pro forma adjustments to working capital provided for from operations	(1,157)	(613)	(283)
Application of funds:			
Decrease in long-term debt	(78)	(79)	(78)
Cash dividends	[2](1,801)	[2](1,801)	[2](1,801)
Total pro forma adjustments to application of funds	(1,879)	(1,880)	(1,879)
Increase (decrease) in working capital	722	1,267	1,596

Increase/(decrease)

[1] Increase in net income is the result of pro forma adjustments shown in appendix N.

[2] Decrease in cash dividends results from lower dividends to be paid by Newrail: $1,199,000 to be paid by Newrail versus $3 million paid by Western Pacific in 1977.

APPENDIX P

Western Pacific system age of track and equipment (December 31, 1977)

	Averagr economic service life (years)	Average age (years)
Roadway:		
First main rail	45	22
Ties	36	18
Equipment:		
Locomotives	18	13.25
Locomotives in subsequent use as switch engines (cumulative)	25	21
Freight cars[1]	26	14.8

[1] Based on the dates that freight cars were built or completely rebuilt. These averages do not relate the age of equipment to the higher capacity of more recently acquired equipment.

APPENDIX Q

Equipment

At December 31, 1977, WPR owned or leased the following units of rolling stock:

	Number of units		
	[1]Owned	[2]Leased	Total
Diesel locomotive units:			
Road	90	43	133
Switching	7	3	10
Total	97	46	143
Freight cars:			
Box general service (unequipped)	1,004	418	1,422
Box general service (equipped)	1,430	735	2,165
Box special service	140	32	172
Gondolas—general service	364	40	404
Gondolas—special service	258	32	290
Hoppers—open top	261	190	451
Hoppers—covered	325	120	445
Flat	508	18	526
Other*	29	-----	29
Total	4,319	1,585	5,904
Service units and caboose cars	269	5	274

[1] Includes equipment subject to lien under outstanding equipment obligations.

[2] Lease commitments (both operating and capital) extend to 1990.

APPENDIX R

Maintenance and betterments to the **Western Pacific system's** owned first main line during the years 1972-1976 were as follows:

	Year ended December 31				
	1972	1973	1974	1975	1976
Track-miles of rail laid[1]	29.0	29.0	30.5	19.4	9.5
Ties installed (thousands)	79	83	86	94	93
Track-miles—surfaced	355	334	247	420	372
Track-miles—spot tamped	1,030	939	880	977	785

[1] In addition 2.5 first main line miles of secondhand rail was relaid in 1972.

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